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No. 99 1078

IN THE SUPREME COURT OF THE UNITED STATES

PEGGY KERNAN, *Petitioner*,

v.

BOBBY HENRY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an officer's knowing and deliberate violation of *Miranda* renders the defendant's statements inadmissible for all purposes, including impeachment, even if the statements were voluntary.

2. Whether the rule stated above is dictated by United States Supreme Court precedent within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989).

3. Whether a defendant's voluntary statements, taken in violation of *Miranda* but admissible because they contradict the defendant's trial testimony, may be used only to determine the credibility of the defendant's testimony, such that a limiting instruction is required even where the defendant rejects such an instruction.

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IN THE SUPREME COURT OF THE UNITED STATES

No. _____

PEGGY KERNAN, *Petitioner,*

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BOBBY HENRY, *Respondent.*

OPINION OR JUDGMENT BELOW

Petitioner respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") issued May 26, 1999 (177 F.3d 1152) and amended on denial of rehearing on October 25, 1999 (__ F.3d __) (Appendix C). The decision reversed the judgment of the United States District Court for the Eastern District of California that denied respondent's petition for writ of habeas corpus. Respondent is a prisoner in state custody pursuant to a judgment of conviction and sentence in the Superior Court of California, County of Sacramento.

Petitioner has included the following orders and opinions as Appendices: (A) the Magistrate Judge's Findings and Recommendations (No. CIV S-95-2055 DFL); (B) the District Court's Order (No. CIV S-95-2055 DFL); (C) the Ninth Circuit's published opinion, as amended upon denial of rehearing, in Henry v. Kernan, No. 98-15768; (D) the Ninth Circuit's unpublished order staying issuance of mandate for 90 days to enable the filing of a petition for writ of certiorari; and (E) a copy of

the transcript of the police interview that is the subject of this petition.

STATEMENT OF JURISDICTION

The Ninth Circuit denied rehearing and filed an amended decision on October 25, 1999. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of way or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

California Evidence Code section 1235:

> Evidence of a statement by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

STATEMENT OF THE CASE

On September 6, 1988, respondent Bobby Henry, armed with two handguns, entered the office of real estate broker Bill Withrow, where he shot him numerous times, killing the victim as he sat behind his desk. Respondent immediately walked to a pay telephone, called the police and told them what he had done. Respondent was taken to the sheriff's office where he was placed in an interview room. After being advised of his *Miranda* rights, he requested counsel. Instead of stopping the interview, one of the detectives asked: "Why did you shoot him anyway?" Respondent explained: "Cheated me out of money. I was loosing [sic] my property." He guessed that he had lost about $50,000. It is the admissibility and use of these statements that is in question here.

Thereafter, respondent again requested counsel, saying: "Am I supposed to keep talking without an attorney?" One of the detectives responded: "Listen, what you tell us we can't use against you right now . . . We'd just would [sic] like to know."[1/] Respondent continued to answer questions. A transcript of the full interview is in Appendix E.

The trial prosecutor conceded that the officers violated respondent's *Miranda* rights when they ignored his request for counsel and continued questioning, but contended that his statements were admissible to impeach if the respondent testified at the trial. At a trial court hearing on admissibility, respondent's counsel stipulated that the officers did not use physical force or threats and agreed that the issue was whether his statements were "involuntary based upon false inducements and/or some false promises." The state trial court found that the

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1. For convenience, petitioner will refer to these comments as "the alleged inducement or promise," the term used by defense counsel at trial.

officers "intentionally went beyond the law" when they ignored respondent's request for counsel, but that there were no "false promises, deceit, or inducement that rises to the level of coercion." The court found that respondent's statements were voluntary beyond a reasonable doubt and were admissible for impeachment.

The respondent did testify at trial, claiming that he acted in self defense. His police interview was admitted for impeachment. The trial court offered a limiting instruction, but the respondent rejected the offer. During closing argument, the prosecutor argued that the police interview contradicted respondent's self defense claim in that respondent never mentioned self defense. The prosecutor also argued that the interview helped show motive, namely, that the victim was cheating respondent out of money. Respondent did not object to this argument. Respondent was convicted of second degree murder with a firearm enhancement and sentenced to state prison for a term of fifteen years to life, plus a two-year enhancement.

This judgment was affirmed by the state Court of Appeal, which independently concluded that all of the respondent's statements during the police interview were voluntary. Referring to the officer's alleged inducement or promise, the court found it was not "of a type which would be reasonably likely to procure a false confession." More importantly, the court held that respondent's most damaging statement, that he believed the victim was cheating him, was made *before* the alleged inducement or promise, so that any error in admitting the remainder of his interview was harmless. The California Supreme Court denied review of this decision.

Respondent next petitioned the United States District Court for the Eastern District of California for a writ of habeas corpus. Permission to proceed in forma pauperis was granted December 5, 1995. The matter was referred to a Magistrate Judge, who, on June 6, 1997,

issued findings, inter alia, that respondent's free will was overborne by the alleged inducement or promise. The Magistrate Judge recommended granting the writ because the prosecutor used the interview to help rebut respondent's self defense claim.

Petitioner objected to these findings and recommendations and, on November 21, 1997, United States District Judge David Levi denied the writ, agreeing with the state appellate court that the most damaging statement, that the victim was cheating respondent out of money, was made *before* the alleged inducement or promise, and that in any event it was not the type of inducement or promise which would produce involuntary statements.

Respondent appealed and, on May 26, 1999, the Ninth Circuit issued a published decision (177 F.3d 1152) holding that *all* of respondent's statements were involuntary because of the alleged inducement or promise, which the court characterized as "slippery and illegal," coupled with what the court perceived as respondent's subsequent incoherence and emotion.[2] Therefore, the court held that it was error to admit the interview into evidence and that the error was prejudicial because the interview tended to show that the killing was intentional and not in self defense. Without distinguishing between respondent's statements before and after the alleged inducement or promise, the court effectively prohibited use at retrial of any part of the interview.

On June 9, 1999, petitioner filed a timely petition for rehearing and suggestion for rehearing en banc. On October 25, 1999, the Ninth Circuit denied rehearing but amended its earlier published decision. In the amendment, the court rejected petitioner's contention that respondent's post-*Miranda* statements did not become

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2. Petitioner disagrees with this characterization, as did the state courts and the United States District Judge.

inadmissible, if at all, until *after* the alleged inducement or promise. The court announced two rules, which present the issues raised in the present petition for certiorari. First, the court held that the knowing and deliberate violation of *Miranda*, which occurred when officers ignored respondent's first request for counsel, rendered all of the remaining statements involuntary as a matter of law so that none of the statements were admissible for impeachment. Second, while the interview was admitted for impeachment, the trial court failed to give a limiting instruction, so that it may have been used substantively. Implicitly, the court announced a rule that trial courts are required to give a limiting instruction, sua sponte, even when the defendant rejects such an instruction.

On November 3, 1999, the Ninth Circuit granted petitioner's application to stay issuance of the mandate for ninety days to permit the filing of this petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has announced two new rules of criminal procedure by which it purports to bind state courts. First, the Ninth Circuit has announced a new exclusionary rule with respect to statements taken in violation of *Miranda*. If a defendant can show that officers knew they were violating *Miranda*, the defendant's statements are inadmissible for any purpose, including impeachment, whether or not they were actually voluntary. This new exclusionary rule conflicts with the teachings of this Court, including *Harris v. New York*, 401 U.S. 222 (1971) and its progeny, with the Fourth Circuit's decision in *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999), *cert. gr.* __U.S.__ (12/6/99), with a recent decision of the California Supreme Court, and with common sense. In effect, it overrules *Harris* in the Ninth Circuit. At the very

least, this rule was not clearly announced and was not clearly dictated by precedent at the time respondent's conviction became final, and it should not be announced or applied in this habeas corpus proceeding. This threshold *Teague* issue has been raised consistently in the lower federal courts, beginning with the objections to the Magistrate Judge's findings and recommendations and throughout Ninth Circuit proceedings, yet it has never been acknowledged or addressed.

Second, the Ninth Circuit has found reversible error because, although respondent's post-*Miranda* statements were admitted for impeachment, no limiting instruction was given and there is a possibility that the jury may have considered them for the truth of the matter asserted. The Ninth Circuit ignored the fact that the state trial court offered a limiting instruction, but defense counsel rejected the offer. Thus, the rule announced in this case appears to be that state trial courts must instruct sua sponte and even over objection that post-*Miranda* statements admitted for impeachment may only be considered for that purpose.

Not only was this instructional issue never raised and briefed,[3] the rule requiring a limiting instruction was not clearly dictated by the teachings of the Supreme Court of the United States, as required by *Teague*. Moreover, petitioner contends that the Constitution does not prohibit substantive use of statements taken in violation of *Miranda*, so long as the statements are not admitted until after the defendant testifies in a way that is inconsistent

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3. It was not until the Ninth Circuit amended its decision on denial of rehearing that it stated the rule being challenged here. Although use of the statements by the prosecutor had been mentioned by the parties in the context of assessing prejudice, the question of whether it was reversible error for the trial court to omit a limiting instruction was not presented or exhausted in state court, nor was it an issue before the District Court.

with his police interview. In other words, assuming statements are voluntary, a *Miranda* violation gives the defendant the power to determine whether or not his police interview will be admitted, but once the defendant unlocks the door on admissibility by testifying in a way that is inconsistent with his police interview, his statements become admissible for all purposes just like any other prior inconsistent statement.

ARGUMENT

I.

THE ADMISSIBILITY OF A STATEMENT TAKEN IN VIOLATION OF *MIRANDA* DEPENDS UPON WHETHER THE STATEMENT WAS VOLUNTARY, NOT UPON WHETHER THE OFFICERS KNEW THEY WERE VIOLATING *MIRANDA*

The Ninth Circuit has ruled that, under the Fifth Amendment, voluntary statements taken in violation of *Miranda* are inadmissible for any purpose, including impeachment, if officers knowingly and deliberately violated *Miranda* by ignoring the suspect's request for counsel. This rule is contrary to decisions of this Court and to the public policy announced in those decisions.

In *Escobedo v. Illinois*, 378 U.S. 478 (1964), the court ruled that a defendant's statements are inadmissible if they are taken in violation of his Sixth Amendment right to counsel, which the court held attaches during custodial interrogation when police have focused upon the individual. The next year, in *Miranda v. Arizona*, 384 U.S. 436 (1965), the court held that, in order to protect the Fifth Amendment self-incrimination rights of a custodial suspect, police must inform him of certain rights, including the right to have counsel present during questioning, and that if they fail to give those warnings or ignore a proper invocation of those rights, any statement the suspect makes thereafter is presumed to be involuntary and is admissible in the prosecution's case in chief. The court noted that underlying the Fifth Amendment is historical concern about coerced admissions and confessions. See also *Michigan v. Tucker*, 417 U.S. 433, 448 (1974) ["Cases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion . . ."]. The

presumption of involuntariness and attendant exclusionary rule were designed to motivate officers to comply with *Miranda*.

The scope of the exclusionary rule was subsequently clarified in *Harris v. New York*, 401 U.S. 222. While a defendant whose *Miranda* rights were violated may prevent the prosecution from using his post-*Miranda* statements during the case in chief, he may not convert the violation into a license to commit perjury, and his statements are admissible for impeachment "provided that the trustworthiness of the evidence satisfies legal standards." *Id.* At 224. It has always been understood that the test of admissibility for impeachment is whether the statement was voluntary, since the essence of Fifth Amendment protection is protection against coercion. *Michigan v. Tucker*, 417 U.S. at 440, quoting *Ullmann v. United States*, 350 U.S. 422, 428 (1956). Thus, the presumption of involuntariness created by a *Miranda* violation is rebuttable, and if rebutted, the defendant's statement is admissible to impeach his trial testimony.

The Ninth Circuit has expanded upon the exclusionary rules of *Miranda* and *Harris* by holding that statements are inadmissible for any purpose if there is proof that the officers knowingly and deliberately violated *Miranda,* whether or not the statements were actually voluntary. By grounding its ruling on the Fifth Amendment, the Ninth Circuit has necessarily held that a knowing and deliberate violation of *Miranda* renders any subsequent statement involuntary as a matter of law, without regard to whether it was actually coerced. In effect, the court has ruled that a defendant may use an officer's deliberate violation of *Miranda* as a shield against impeachment and therefore testify falsely with impunity.

This decision is in direct conflict with the policy underlying *Harris* and appears to be contrary to other decisions of this Court. For example, in *Oregon v. Haas*, 420 U.S. 714 (1975), this Court decided that, for purposes

of the *Harris* rule, it makes no difference whether the defendant's statements were made before required warnings were given, as in *Harris*, or afterwards, as in *Haas*. The court noted that the full deterrence value of the *Miranda* exclusionary rule remains the same whether or not the officer knows the warnings are defective. *Id.* at 723. The court rejected the argument that statements should be excluded for all purposes, including impeachment, where the officer knows the suspect has requested counsel, but proceeds with questions anyhow because he has nothing to lose. Instead, the court noted that it had already struck the appropriate balance between deterrence and proper impeachment when it decided *Harris*. The court concluded by saying:

> If, in a given case, the officer's conduct amounts to an abuse, that case, like those involving coercion or duress, may be taken care of when it arises *measured by the traditional standards for evaluating voluntariness and trustworthiness.*

Id. at 723 [emphasis added.].

Similarly, in *Michigan v. Tucker*, 417 U.S. at 447, the court noted:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence [in the case in chief] gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused.

In *Tucker*, the court held that the defendant's constitutional rights were not violated by the admission of the testimony of a witness discovered through the defendant's voluntary statements, even though officers failed to inform the defendant of his right to counsel prior

to his making those statements. The court found that arguments in favor of admitting the testimony were "quite strong" and included the important public policy interests of allowing the trier of fact to consider relevant and trustworthy evidence, as well as society's interest in the effective prosecution of criminals. *Id.* at 450-451. The court expressly rejected a contention that a different and more comprehensive exclusionary rule should apply where there have been "lawless invasions of the constitutional rights of citizens." *Id.* at 450, fn. 25.

The present case is not different. Prior to amending its decision, the Ninth Circuit held that *all* of respondent's statements were involuntary because of the officer's alleged inducement or promise. However, respondent's most incriminatory statement was made *before* the alleged inducement or promise, a point dealt with by the Ninth Circuit in the amended portion of the decision, filed October 25. There, the court purported to recognize that the *Harris* decision might ordinarily control, but for the fact that the officers deliberately violated *Miranda*. The court held that the knowing and deliberate *Miranda* violation rendered respondent's statement involuntary as a matter of law. Petitioner contends that this ruling violates previous rulings of this Court and that it is inconsistent with the public policies discussed in the decisions. It is also inconsistent with the recent holding of the California Supreme Court in *People v. Peevy*, 17 Cal.4th 1184 (1998), where the state court unanimously concluded that statements otherwise admissible under

Harris are not made inadmissible because officers knew they were violating *Miranda* when they took the statements.[4]

There is a significant danger if the Ninth Circuit's decision is allowed to stand. Not only will relevant and otherwise admissible evidence be kept from juries, but the exclusionary rule itself will likely be expanded to cover virtually all *Miranda* violations. What apparently triggered the exclusionary rule in this case, according to the Ninth Circuit, was the officer's admission that he knew that, under *Miranda*, he should have ceased questioning when the respondent requested counsel. In the next case, a defendant will argue that the officer's admission is irrelevant if it appears that the officer reasonably *should have known* that the interrogation had to stop as soon as he requested counsel. Since the *Miranda* rules themselves are well known, it will be relatively easy to demonstrate that a trained officer reasonably should have known that his actions violated *Miranda*, and therefore that his continued questioning was a knowing and deliberate violation of *Miranda*. Hence, in the Ninth Circuit, *Harris* will no longer be the rule because it will have been effectively overruled by *Henry*.

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4. The rule is also inconsistent with *United States v. Dickerson*, 166 F.3d at 667, where the court held that a confession is admissible if voluntary and that it is not made inadmissible by a *Miranda* violation. On December 6, 1999, this Court announced that it has granted *certiorari* to review that decision.

II.

AT THE VERY LEAST, IT IS IMPROPER TO ANNOUNCE AND APPLY A NEW EXCLUSIONARY RULE UPON COLLATERAL REVIEW OF A FINAL STATE DECISION

In *Teague v. Lane*, 489 U.S. 288, 310 (1989), this Court made it clear that federal courts may not generally announce or apply new constitutional rules of criminal procedure to cases which became final before the new rule was announced. See also *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989). The court has explained that a new rule is one which "breaks new ground," "imposes a new obligation on the States or the Federal Government" or was not "dictated by precedent existing at the time the defendant's conviction became final." *O'Dell v. Netherland*, 521 U.S. 151, 156-157 (1997); see also *Stringer v. Black*, 503 U.S. 222, 227 (1992).

Respondent's conviction became final in 1992. On July 8, 1992, the California Supreme Court denied review of the Court of Appeal decision affirming respondent's conviction and sentence. The time for filing a petition for writ of certiorari expired later that year, on or about October 6, 1992.

At the time of respondent's trial and throughout his appeal, the legal landscape included *Miranda, Harris, Tucker, Haas,* and similar cases which prohibited use of statements during the case in chief if they were taken in violation of *Miranda*, but which allowed the statements to be used for impeachment, provided they were voluntary. No decision of the Supreme Court of the United States required the total exclusion of voluntary statements where officers deliberately violated *Miranda*, nor did any decision suggest that a deliberate violation rendered the statements involuntary as a matter of law. Hence, it was never

argued on direct appeal that a deliberate violation rendered the statements inadmissible. Instead, it was argued that the defendant's statements were involuntary because they were a product of the alleged inducement or promise; respondent never contended that his pre-promise statement that the victim was cheating him was involuntary and inadmissible.

As noted in the preceding argument, this Court has never held that in-custody statements are inadmissible for any purpose if officers deliberately violate *Miranda*. Certainly, it cannot be said that such a rule should have been apparent to all reasonable jurists (see *Lambrix v. Singletary*, 520 U.S. 518, 538 (1997), for as noted, the teachings of this Court lead in the opposite direction. In 1998, approximately six years after respondent's case became final, the California Supreme Court reviewed the decisions of this Court in *People v. Peevy*, 17 Cal.4th 1184, and concluded that a deliberate violation did not make the defendant's statement inadmissible for impeachment. Even the Ninth Circuit in the present case could point only to its own 1992 decision in *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992), a civil rights case in which the court found actual coercion.[5] Both the California Supreme Court in *Peevy* (*id.* at 1202) and the District Judge in his order in the present case properly recognized that *Cooper v. Dupnik* was inapplicable.

Petitioner repeatedly raised the *Teague* bar in this case. This Court has often said that *Teague* is a "threshold question" which must be addressed before a court considers the merits. *Lambrix* at 524; *Goeke v. Branch*, 514 U.S. 115, 117 (1995); *Teague* at 300.

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5. See also *California Attorneys for Criminal Justice v. Butts*, __ F.3d __, 1999 W.L. 1005103 (9th Cir. 1999) where the Ninth Circuit held that a deliberate *Miranda* violation involves a denial of Fifth Amendment self-incrimination rights and is actionable under the Civil Rights Act.

However, the Ninth Circuit did not even acknowledge this issue in its decision, much less explain why it did not feel bound by *Teague*. Even if the Ninth Circuit believes, albeit erroneously, that its own decisions bind state courts within the meaning of *Teague* (see *Ortega v. Roe*, 160 F.3d 534 (9th Cir. 1998) and *Moore v. Calderon*, 101 F.3d 261 (9th Cir. 1997)), the *Teague* issue should have been addressed because it was timely raised and because other courts had found *Cooper* inapposite. In this case, the Ninth Circuit plainly violated the rule of *Teague v. Lane* and it was improper both to announce and apply the rule that statements taken after a knowing and deliberate violation of *Miranda* are inadmissible for any purpose, even if they were clearly voluntary.

III.

STATE TRIAL COURTS SHOULD NOT BE CONSTITUTIONALLY REQUIRED TO INSTRUCT THE JURY TO LIMIT ITS CONSIDERATION OF IMPEACHMENT EVIDENCE

In order to grant the writ of habeas corpus in the present case, the Ninth Circuit had to find that it was prejudicial error to admit respondent's statements to police. In its initial decision, the court did not distinguish statements made before the alleged inducement or promise from statements made thereafter. The court found prejudice because the prosecutor used the respondent's statements to show that respondent never told detectives that he killed the victim in self-defense and that he could not explain why he took his guns with him when he went to the victim's office. The court noted that respondent's statement provided motive.

In its amendment upon denial of rehearing, the court discussed only that portion of respondent's statement that preceded the alleged inducement or promise. It was in that portion of the statement that respondent told detectives that he believed the victim was cheating him out of money. In addition to ruling that the statement was inadmissible because the officer deliberately violated respondent's *Miranda* rights, the court found that the error was prejudicial because, even though it was admitted for impeachment, the trial court did not give a limiting instruction, thus inviting substantive use of the statement. The Ninth Circuit did not acknowledge that the trial court offered an instruction and the defense declined, or that the defense did not object during the prosecutor's closing argument. Therefore, the holding of the Ninth Circuit is that trial courts are obligated to instruct sua sponte that statements admitted for

impeachment under *Harris v. New York* may only be considered for that purpose and may not be considered for the truth of the matter.

Initially, petitioner contends that this instructional issue was not properly before the Ninth Circuit, since it had never been raised, either in state or federal court. As a basis for reversal, the issue arose for the first time in the Ninth Circuit's amended decision on denial of rehearing. In addition, because petitioner believes the instructional rule announced by the Ninth Circuit is a new rule within the meaning of *Teague v. Lane,* it may not be announced or applied in this habeas corpus proceeding. More importantly, petitioner contends that error was not committed in this case and that it is wrong to limit a jury's consideration of voluntary statements to impeachment, particularly where the defense rejects an instruction and no objection is raised to the prosecutor's closing arguments.

Petitioner contends that *Miranda* and *Harris* describe rules of admissibility, not rules governing the use of evidence that is properly admitted. There is nothing inherently wrong with using a defendant's own voluntary statements to prove guilt. In *Oregon v. Elstad*, 470 U.S. 298, 305 (1984), this Court said:

> Voluntary statements "remain a proper element in law enforcement." *Miranda v. Arizona,* 384 U.S. at 478. Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced are inherently desirable. . . . Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions. *United States v. Washington,* 431 U.S. 181, 187 (1977).

The exclusionary rule of *Miranda* contradicts and frustrates these principles unless it is interpreted as a rule of admissibility rather than a rule limiting use. Petitioner

contends that is a proper interpretation of *Miranda* and its progeny.

In *Michigan v. Tucker*, 417 U.S. at 452, the court noted that the exclusionary rule of *Miranda* "enabled [defendant] to block admission of his own statements . . ." in the prosecution's case in chief. This is true even if it is shown, as it was in this case, that the defendant's statements were voluntary and trustworthy. Under *Harris*, however, the defendant loses his ability to block admission if he testifies in a way that is inconsistent with his police interview. Once it is determined that a defendant's statements are voluntary and trustworthy, and that they are admissible because they are inconsistent with his trial testimony, there is no constitutional reason why use of the statements must be limited to impeachment. The purpose of the exclusionary rule is satisfied by giving the defendant the key to admissibility, and the important public policy favoring substantive use of his voluntary and trustworthy admissions is served by allowing them to be used in any manner the jury sees fit if the defendant elects to throw away the key and allow the statements to be admitted.

Petitioner acknowledges statements in *Harris* and other cases that imply that a limiting instruction is required. In *Harris*, the trial court gave a limiting instruction, so the issue of whether such an instruction was constitutionally required never arose. Similarly, dicta in *Richardson v. Marsh*, 481 U.S. 200, 206-207 (1987) that a limiting instruction is required is not persuasive because the court merely cited *Harris* for the principle.

As the Ninth Circuit noted in its decision, California Evidence Code section 1235 generally permits use of a prior inconsistent statement not only to contradict trial testimony, but also for the truth of the matter stated. The constitutionality of section 1235 was expressly upheld by this Court in *California v. Green*, 399 U.S. 149 (1970), which reversed a decision of the California Supreme Court holding that section 1235 violated the Sixth Amendment

confrontation right. The court held that where the declarant testifies and has a chance to defend or explain the prior inconsistent statement, the Confrontation Clause does not prevent its admission for substantive use. *Id.* at 164. The court went on to note that, when those conditions are satisfied, "we find little reason to distinguish among prior inconsistent statements on the basis of the circumstances under which the prior statements were given." *Id.* at 168.

While there is admittedly a distinction between the Sixth Amendment issue considered in *California v. Green*, where the prior inconsistent statement was made by a witness, and the Fifth Amendment issue in this case, where the statement was made by the defendant, the distinction is irrelevant once the statement is found to be voluntary and trustworthy, as well as inconsistent with the defendant's trial testimony. *Harris* makes the defendant's prior statement admissible, and Evidence Code section 1235 allows it to be used to prove the truth of the matter, just as any other voluntary admission or confession. For this reason, the Ninth Circuit was wrong in announcing a new rule that a limiting instruction must be given sua sponte in all cases when a defendant's prior inconsistent statement to an officer is admitted under *Harris*.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's decision in *Henry* announced both new and incorrect rules of criminal procedure which are inconsistent with prior decisions of this Court and with a recent decision of the California Supreme Court. This case present an opportunity to resolve important federal constitutional questions concerning the admissibility and use of statements taken in violation of *Miranda*. It also presents an opportunity to remind lower federal courts of the limitations of collateral review. Petitioner respectfully urges this Court to grant certiorari to resolve the issues of law presented herein.

Dated: December 16, 1999.

Respectfully submitted,

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EDITOR'S NOTE

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No. 99 1078 DEC 27 1999

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IN THE SUPREME COURT OF THE UNITED STATES

PEGGY KERNAN, *Petitioner*,

v.

BOBBY HENRY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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APPENDIX A

FILED
JUN 6 1997

Clerk, U.S. District Court
Eastern District of California
By Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BOBBY GENE HENRY,

Petitioner, No. CIV S-95-2055 DFL JFM

vs.

PEGGY KERNAN, et al.,

Respondents.

FINDINGS AND RECOMMENDATIONS

_____/

Petitioner is a state prisoner proceeding by counsel with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner's first federal habeas application, Henry v. Gomez, Case No. CIV S-92-1301 DFL JFM, was dismissed without prejudice on July 13, 1995, to

permit petitioner to exhaust state remedies. This court has granted respondents' motion to take judicial notice of the files and records in Case No. CIV S-92-1301.

Petitioner challenges his 1990 conviction of second degree murder in violation of California Penal Code § 187, with an enhancement for personal use of a firearm in violation of California Penal Code § 12022.5. Petitioner alleges that (1) his statements to police interrogators were elicited in violation of the Fifth Amendment and were improperly admitted for any purpose at trial because the statements were not made voluntarily and were made after petitioner's unequivocal invocation of his right to counsel: and (2) the trial court's admission of petitioner's statements to Dr. Sander violated petitioner's constitutional right to privacy.

FACTUAL AND PROCEDURAL BACKGROUND

On January 31, 1989, an information was filed in the Sacramento County Superior Court charging petitioner with murder. (Clerk's Tr. ("CT") at 167.) On January 11,

1990, a jury trial commenced. (CT at 260.) The trial ended on February 21, 1990, when a mistrial was declared because the jury deadlocked. (CT at 300.) A second trial commenced on June 12, 1990. (CT at 375.) The second trial ended on July 20, 1990, with petitioner's conviction of second degree murder. (CT at 610.)

The following factual background is quoted from the opinion of the California Court of Appeal, Third Appellate District, filed on April 16, 1992 in case number C010119:

> [Petitioner] admitted at trial that he had shot the victim, Bill Withrow. The two had engaged in business deals together and [petitioner] believed that either through cheating him or giving him bad advice Withrow had cost him substantial sums of money. [Petitioner] had repeatedly but unsuccessfully asked Withrow to repay the money he believed Withrow owed him.
>
> [Petitioner] testified that on the day in question he went to Withrow's office intending to yell at and scare Withrow into paying back some of the money. Withrow had previously shown [petitioner] a gun he kept in his desk drawer. In a previous discussion about debts, [petitioner] had grabbed Withrow

who had then implied [petitioner] might be injured if this happened again. [Petitioner] also believed one of Withrow's associates was a Hell's Angel. [Petitioner] was afraid of Withrow and therefore took two handguns with him when he went to Withrow's office.

[Petitioner] went in to Withrow's office and began asking about the money and yelling at Withrow. According to [petitioner], Withrow said that no one was going to keep him from being famous and reached toward the desk drawer which held his gun. [Petitioner] shot Withrow believing Withrow was about to shoot him.

[Petitioner] drove away but then stopped and called the police. He identified himself, told the operator he had killed Withrow and said that he wanted to surrender. [Petitioner] was distressed and said he had done something stupid and needed to be killed.

[Petitioner] was taken into custody and interviewed by the police the same day. This interview was taperecorded.

The officers initially gave the Miranda warnings and then the following exchange occurred:

[Officer]: You understand your rights Bobby?

[Petitioner]: I think so.

. . . .

[Officer]: . . . You have any questions about your rights.

[Petitioner]: (Inaudible) can I have my lawyer here, I don't

[Officer]: That's ah up to you; you're entitled to have an attorney present before you're questioned.

[Petitioner]: Right. Probably should have one now.

[Officer]: You do want an attorney?

[Petitioner]]: Yes, please.

[Officer]: Why did you shoot him anyway.

[Petitioner]: Pardon.

[Officer]: Why did you shoot him.

[Petitioner]: Cheated me out of money, I was loosing (sic) my property.

[Officer]: How much money you talking about.

[Petitioner]: I couldn't figure it out, it was so scrambled up, I think it was, I don't know, like, maybe fifty thousand.

[Officer]: How - how did he have your money, anyway.

[Petitioner]: I gave it to him.

[Officer]: Was it cash you gave to him.

[Petitioner]: I wrote him checks. Am I supposed to keep taking (sic) without an attorney. Was I --

[Officer]: Listen, what you tell us we can't use against you right now.

[Petitioner]: Okay.

[Officer]: We'd just like to know.

[Petitioner] then went on to describe his business dealings with Withrow and other problems he had had. He was crying at times during the questioning. [Petitioner] told the officer he did not know why he had taken the guns with him to Withrow's office. He also said he did not know why he had taken two guns.

Withrow was shot 10 to 13 times. There were several defensive wounds in his hands and one appeared to be a contact wound.

Two handguns were found in an open briefcase in Withrow's office. It appeared both had been fired. Another handgun was later found in Withrow's desk drawer.

Before trial [petitioner] moved to exclude evidence of his statement to the police. He argued his Miranda rights, right to counsel and privilege against self-incrimination had been violated and that the statement bad been coerced. Sacramento

County Sheriff's Lieutenant Harry Machen testified at the hearing on the motion that he had interviewed [petitioner]. Sheriff's Detective Robert White was also present. The interview had lasted about an hour.

Machen acknowledged [petitioner] had asked for a lawyer and that he continued questioning [petitioner] after he made this request. Machen said that he had told [petitioner] he wanted to know what had happened because the information could be valuable to the prosecution for impeachment purposes. Machen understood that even if a statement was obtained in violation of the Miranda rules it could skill be used for impeachment. In fact, he admitted that at the point when [petitioner] asked for an attorney and the questioning continued Machen understood the statement would be in violation of Miranda but that it could be used for impeachment. Machen also said that he "quite often" continues questioning a suspect after he or she invokes Miranda rights. It was also Machen's understanding that he was permitted to continue questioning a person even after the right to counsel is invoked.

Sheriff's Detective White testified at the hearing that he had made the statement that "what you tell us we can't use against you right now." He said this because although [petitioner]'s statement could not be used as an admission or confession it would be available for impeachment. White was also aware the statement was being taken in violation of Miranda.

The court ruled that Machen and White intentionally violated Miranda in order to obtain

[petitioner]'s statement for possible use in impeaching "petitioner] if he testified at trial. However, the

[Petitioner]: Okay.

[Officer]: We'd just like to know.

[Petitioner] then went on to describe his business dealings with Withrow and other problems he had had. He was crying at times during the questioning. [Petitioner] told the officer he did not know why he had taken the guns with him to Withrow's office.. He also said he did not know why he had taken two guns.

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Before trial [petitioner] moved to exclude evidence of his statement to the police. He argued his Miranda rights, right to counsel and privilege against self-incrimination had been violated and that the statement bad been coerced. Sacramento County Sheriff's Lieutenant Harry Machen testified at the hearing on the motion that he had interviewed [petitioner]. Sheriff's Detective Robert White was also present. The interview had lasted about an hour.

Machen acknowledged [petitioner] had asked for a lawyer and that he continued questioning [petitioner] after he made this request. Machen said that he had told [petitioner] he wanted to know what had happened because the information could be valuable to the prosecution for impeachment purposes. Machen understood that even if a statement was obtained in violation of the Miranda rules it could skill be used for impeachment. In fact, he admitted that at the point when [petitioner] asked for an attorney and the questioning continued Machen understood the statement would be in violation of Miranda but that it could be used for impeachment. Machen also said that he "quite often" continues questioning a suspect after he or she invokes Miranda rights. It was also Machen's understanding that he was permitted to continue questioning a person even after the right to counsel is invoked.

Sheriff's Detective White testified at the hearing that he had made the statement that "what you tell us we can't use against you right now." He had said this because although [petitioner]'s statement could not be used as an admission or confession it would be available for impeachment. White was also aware the statement was being taken in violation of Miranda.

The court ruled that Machen and White intentionally violated Miranda in order to obtain [petitioner]'s statement for possible use in impeaching [petitioner] if he testified at trial. However, the court found the officers did not use false promises, deceit or improper inducement amounting to coercion. The court concluded the officer's assertion that [petitioner]'s statement

> could not be used against him "right now" was accurate and that the officer's statement that "We just wanted to know" was also true ~ because the officers were attempting to collect information about the crime. The court therefore found the People had established beyond a reasonable doubt that [petitioner]'s statement was voluntary. As a result the People were permitted to offer [petitioner]'s statement to impeach his credibility at trial.
>
> The court stated: "I regret that law enforcement officers such as the two that were here conduct themselves in that manner. But nevertheless I'm bound to follow the law."

During cross-examination of petitioner at trial, the prosecutor referred to statements made by petitioner during the police interrogation. (Reporter's Tr. ("RT") at 1139-40, 1142-46, 1149-52, 1154-55, 1163-66, 1177, 1184-85.) The prosecutor subsequently called Sheriff's Lieutenant Machen as a rebuttal witness and played for the jury the entire tape recording of petitioner's statements during the interrogation; each juror was provided with a copy of an unedited transcript of the interview. (RT at 1341 -42.)

ANALYSIS

A writ of habeas corpus is available under 28 U.S.C. § 2254 "only on the basis of some transgression of federal law binding on the state courts." Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985), cert denied, 478 U.S. 1021 (1986). "It is unavailable for alleged error in the interpretation or application of state law." Id.; see also Givens v. Housewright, 786 F.2d 1378. 1381 (9th Cir. 1986).

I. Fifth Amendment Claim

Petitioner claims that the state trial court erred in allowing the introduction of statements he made to police officers after he requested counsel. He contends that the statements were introduced in violation of the Fifth Amendment because the statements were not made voluntarily and were not made pursuant to a waiver of the right to counsel.

To prevail on his Fifth Amendment claim, petitioner must demonstrate that his statements were obtained

by police interrogators in violation of the rules of custodial interrogation established by the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966), that the state trial court committed error in permitting the prosecution to use the product of the improper interrogation, and that the error had a substantial and injurious effect or influence on the jury's determination of its verdict. See Pope v. Zenon, 69 F.3d 1018. 1020 (9th Cir. 1995). After careful consideration of the record[1/] in this matter, this court finds that petitioner has made the required showing and is entitled to relief on his Fifth Amendment claim.

---

1. The record before the court includes an audio cassette tape lodged by petitioner's counsel on February 6, 1995 in Case No. CIV S-92-1301. An accompanying declaration certifies that the audio cassette tape is a true copy of the tape recording of a statement by Bobby Gene Henry on September 6, 1988. The audio cassette tape is generally consistent with the transcript found in the record. (Clerk's Augmented Tr. on Appeal at 12-33.) This court finds a few portions of the interview designated "inaudible" in the transcript to be audible on the tape. The court also finds a few discrepancies between the tape recording and the transcript. The discrepancies are minor and not material to this court's analysis or recommendation.

A. Statements Obtained in Violation of Miranda

In Miranda v. Arizona the Supreme Court held that a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that police must explain this right to him before questioning begins. 384 U.S. 436, 469-73 (1966). "[I]f a suspect requests counsel at any time during the interview, he [is] not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." Davis v. United States, 512 U.S. 452, 458 (1994) (citing Edwards v. Arizona, 451 U.S. 477, 484-85 (1981)).

To prevent police from badgering a defendant into waiving his previously asserted Miranda rights, "a suspect who has invoked the right to counsel cannot be questioned regarding any offense unless an attorney is actually present." Davis, 512 U.S. at 458 (citing Minnick v. Mississippi, 498 U.S. 146 (1990)). The prohibition on further questioning is not itself required by the Fifth Amendment's prohibition on

coerced confessions but is justified by reference to its prophylactic purpose. See id. (citing Connecticut v. Barrett, 479 U.S. 593 598 (1987)). Invocation of the Miranda right to counsel requires only an unambiguous request for counsel, i.e., a request that a reasonable police officer in the circumstances would understand to be a request for an attorney. See id. at 459.

In the case at bar, any reasonable interrogating officer would have understood that petitioner was requesting an attorney when he asked, "[C]an I have my lawyer here," and when he further responded with an unequivocal "Yes, please" after one of the officers asked "You do want an attorney?" (Clerk's Augmented Tr. ("CAT-) at 14.) In spite of petitioner's unambiguous request for counsel, questioning continued and a statement was elicited from petitioner by the officers. The record reflects that each officer was aware that petitioner's statement was being taken in violation of Miranda and that the officers intentionally violated Miranda in order to obtain a statement for possible use in impeaching

petitioner if he testified at trial. Petitioner has demonstrated that his statements were obtained by police interrogators in violation of Miranda.

B. Error in Admitting the Statements

This court must next determine whether the state trial court committed error in permitting the prosecution to use petitioner's statements for impeachment purposes.

In Miranda, the Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444. "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Id .at 473-74.

> A reasonable and faithful interpretation of the Miranda opinion must rest on the intention of the Court in that case to adopt "fully effective

> means . . . to notify the person of his right of silence and to assure that the exercise of that right will be scrupulously honored. . . ." The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his "right to cut off questioning" was "scrupulously honored."

Michigan v. Mosley, 423 U.S. 96, 103-04 (1975) (quoting Miranda, 384 U.S. at 474, 479) (citations omitted).

"An accused in custody, 'having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him,' unless he validly waives his earlier request for the assistance of counsel." Smith v. Illinois, 469 U.S. 91, 94-95 (1984) (per curiam) (quoting Edwards v. Arizona, 451 U.S. 477, 484-85 (1981)).

"Edwards set forth a 'bright-line rule' that all questioning must cease after an accused requests counsel." 469 U.S. at 98; see also Solem v. Stumes, 465 U.S. 638, 646 (1984). "In the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." 469 U.S. at 98 (citing Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983)).

To prevent violations of the bright-line rule, the Supreme Court has ruled that evidence obtained in violation of the Miranda requirements is "inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt." James v. Illinois, 493 U.S. 307, 313 (1990). A defendant's incriminating statements obtained in violation of Miranda requirements may be introduced for the purpose of impeaching the credibility of the defendant's own testimony at trial, if the defendant's statements were

voluntary and reliable and "the likelihood that admissibility of such evidence would encourage police misconduct is but a 'speculative possibility.'" Id., at 311-12 (quoting Harris v. New York, 401 U.S. 222, 225 (1971)).

In Harris v. New York, the Supreme Court justified the creation of an exception to the exclusionary rule on the ground that "[t]he shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." Harris v. New York, 401 U.S. 222, 226 (1971). In Harris the defendant had asserted no claim that the statements he made to the police were coerced or involuntary, and his testimony at trial "contrasted sharply with what he told the police shortly after his arrest." Id. at 224-25. The Court explained that where a defendant's statements were not coerced or involuntary, the impeachment process

> undoubtedly provide[s] valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost

> . . . because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.

Id. at 225. In carving out this exception to the exclusionary rule, the Court acknowledged that "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so," but held that the privilege "cannot be construed to include the right to commit perjury." Id. at 645. See also Walder v. United States, 347 U.S. 62, 65 (1954) (holding that there is no justification for letting a criminal defendant "affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility").

On the other hand, "any criminal trial use against a defendant of his involuntary statement is a denial of due process of law, 'even though there is ample evidence aside from the confession to support the conviction.'" Mincey v.

Arizona, 437 U.S. 385, 397-98 (1978) (quoting Jackson v. Denno, 378 U.S. 368, 376 (1964)). See also Oregon v. Hass, 470 U.S. 714, 722 (1975); Harris, 401 U.S. at 224.

The test of voluntariness is well established: "'Is the confession the product of an essentially free and unconstrained choice by its maker? . . . The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.'" Collazo v. Estelle, 940 F.2d 411, 416 (9th Cir. 1991) (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)), cert. denied, 502 U.S. 1031 (1999). If a statement was not the product of a rational intellect and a free will, a conviction arising from the use of the statement cannot stand. See Mincey v. Arizona, 437 U.S. at 398 (citing Townsend v. Sain, 372 U.S. 293, 307 (1963), and Blackburn v. Alabama, 361 U.S. 199, 208 (1960)). Psychological as well as physical coercion is proscribed, for "'the blood of the accused is not the only hallmark of an unconstitutional

inquisition.'" Mincey, 437 U.S. at 401 (quoting Blackburn, 361 U.S. at 206).

Determination of whether a statement is voluntary requires an evaluation of all the circumstances of the interrogation. See Mincey, 437 U.S. at 401. More precisely, in evaluating the voluntariness of a confession, the court must determine "'whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne.'" Derrick v. Peterson, 924 F.2d 813, 817 (9th Cir. 1990) (quoting United States v. Leon Guerrero, 847 F.2d 1363, 1366 (9th Cir. 1988)), cert. denied, 502 U.S. 853 (1991). A confession is involuntary within the meaning of the Due Process Clause only if the police used coercive activity to undermine the suspect's ability to exercise his free will. See Colorado v. Connelly, 479 U.S. 157, 163 & n.1, 167 (1986); Oregon v. Elstad, 470 U.S. 298, 305 (1985); Derrick, 924 F.2d at 818. The presence of police

overreaching is a crucial element. See Derrick, 924 F.2d at 818.

The ultimate question of "whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination." Miller v. Fenton, 474 U.S. 104, 112 (1985); see also Derrick, 924 F.2d at 817. Only the state court's subsidiary factual determinations underlying the issue of voluntariness are entitled to a presumption of correctness. See Miller v. Fenton, 474 U.S. at 112; LaVallee v. Delle Rose, 410 U.S. 690, 693-95 (1973) (per curiam); Townsend v. Sain, 372 U.S. 293, 306 (1963); Derrick, 924 F.2d at 817.

The United States Court of Appeals for the Ninth Circuit has analyzed the circumstances under which statements made by a suspect in custody are compelled or coerced in violation of the Fifth Amendment. In Cooper v. Dupnik, a civil rights action, police officers testified that

they began their interrogation of Cooper with a premeditated plan to ignore the suspect's constitutional right to remain silent as well as any request he might make to speak with an attorney. Cooper v. Dupnik, 963 F.2d 1220, 1224 (9th Cir.), cert. denied, 506 U.S. 953 (1992). "Although the officers knew any confession thus generated would not be admissible in evidence in a prosecutor's case in chief, they hoped it would be admissible for purposes of impeachment if the suspect ever went to trial." Id. They expected that the confession they obtained would hinder any possible insanity defense and prevent the suspect from testifying at trial that he was innocent. See id. Accordingly, the interrogators simply ignored the suspect's invocation of his rights and continued to question him for more than four hours in an unsuccessful attempt to force a confession. See id. at 1228-32. The suspect "was reduced to a state of agitation and anxiety marked by tears and sobbing." Id. at 1231.

In deciding that the plaintiff stated a cause of action under 42 U.S.C. § 1983 for a violation of his Fifth Amendment rights, the court found that

> Barkman and his companions conspired not only to ignore Cooper's response to the advisement of rights pursuant to Miranda, but also to defy any assertion of the Constitution's Fifth Amendment substantive right to silence, and to grill Cooper until he confessed . . . Cooper's interrogators tried first to trick him into foregoing his right to silence by turning the Miranda advisement into a farce. . .
>
> When Barkman's trick failed, the Task Force turned to interrogation tactics that by any measure were impermissibly coercive. The clear purpose of these tactics was to make Cooper talk, and to keep him talking until he confessed. The Task Force refused to honor Cooper's rights when Cooper asserted them, and simply continued questioning him as if no request for counsel had been made.

Id. at 1242-43. The court observed that "'any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show the defendant did not voluntarily waive his privilege.'" Id. at 1249-43 (quoting Miranda, 384 U.S. at 476). The court also noted that the custodial environment "'carries its own badge of intimidation,'" and "'the

compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.'" Id. at 1242 (quoting Miranda, 384 U.S. at 456-58, 461).

In Collazo v. Estelle, a habeas corpus proceeding, the Ninth Circuit Court of Appeals held that a police officer's attempt to discourage the defendant from speaking to a lawyer was not "compatible with a system of justice that does not permit police coercion." Collazo v. Estelle, 940 F.2d 411, 416 (9th Cir. 1991) (en bane), cert. denied, 502 U.S. 1031 (1992). After Collazo was arrested, he was escorted to an interview room at the police station and was advised of his rights by Officer Rolen. After some discussion, Collazo asked to talk to his lawyer. Instead of respecting Collazo's request, Officer Destro "attempted to pressure him into dispensing with counsel and talking to them about the homicide," stating, "Once you get a lawyer, he's gonna say forget it. You know, don't talk to the police.

Then it might be worse for you." After a few more comments by the officers, including a reiteration that it might be worse for him if he did not talk to them, the officers left Collazo in the interview room. Collazo was allowed to call and then to see his wife, who came to the police station and had a lengthy discussion with him. Approximately three hours after the officers had left the interview room, Collazo asked a sergeant where the investigators were. The sergeant, construing the inquiry as a request to talk to the investigators, summoned the officers. After the officers again advised Collazo of his Miranda rights, Collazo confessed to his role in the crimes for which he had been charged and arrested. See id. at 413-14.

The court found that the officer's initial pressure on the defendant was coercive and carried over to taint the defendant's subsequent waiver of Miranda rights and confession. Id. at 416 & n.5. In so finding, the court considered the menacing character of the officer's statements, the fact that the statements were "calculated to

pressure Collazo into changing his mind about remaining silent, and into talking without counsel to his interrogators," and the implication that the defendant would be penalized for exercising rights guaranteed to him under the United States Constitution. Id. at 416-17. The court analyzed the Fifth Amendment violation as follows:

> We are not unaware of the complex challenges faced by law enforcement officers as they discharge their important and difficult responsibilities in accord with Constitutional principles and the rules designed to protect them. Nevertheless, this is a nation where the rule of law prevails, where ends do not justify inappropriate means. Miranda had been part of our law since 1966. Most law enforcement officers abide faithfully by its requirements even though they find them on occasion to be frustrating. As long as Miranda is on the books, it must be respected. In this case, it was not honored. It was disobeyed.
>
> . . . .
>
> Based on the foregoing, our plenary review of the tactics used by Officer Destro in an attempt to pressure Collazo into talking to his adversaries leads us to a two-part conclusion. First, Officer Destro's tactics add up to a flagrant breach of the prophylactic rules established by the Supreme Court in

> Miranda and its progeny to protect a defendant's Constitutional right against self-incrimination. Second, Officer Destro's overreaching behavior violated not only Miranda, but also the general Constitutional prohibition against coercive interrogation practices likely to result in involuntary responses. Officer Destro's gambit was inconsistent with Collazo's Fifth Amendment right against self-incrimination as well as his right to consult an attorney. His inquisitorial stratagem was calculated to break Collazo's will. As such, it offends due process as guaranteed by the Fourteenth Amendment.

Id. at 419-20.

In a case with facts similar to those of the case at bar, the California Court of Appeal held that statements made by a suspect to police officers after he invoked his right to an attorney were coerced. People v. Bey, 21 Cal. App. 4th 1623 (1993). In Bey, the defendant was interviewed by two detectives for only fifteen minutes. The defendant was asked several questions and was then advised of his Miranda rights. The defendant stated three times that he would not talk to the police without an attorney. One of the detectives then stated, "Let me explain something to you,

James. I'm going to continue to ask you questions. Now, you realize that you didn't waive your rights. That means we can't use 'em in court." After the defendant reiterated his intention not to talk, the detectives told the defendant that incriminating physical evidence had been found in his apartment. The defendant again responded that he would not say anything without his attorney. One of the detectives then asked, "Why don't you tell me what happened that night?" In response to numerous questions from the officers, the defendant gave an account of the events on the night of the murder which was inconsistent in some respects with his testimony at trial, but he did not confess to the crime. See id. at 1626-27.

At trial, one of the officers testified that he had continued to question the defendant so that, if the defendant did take the stand, his testimony could be impeached. The officer admitted that he had attended seminars where it was suggested as a tactic to keep asking questions even after a suspect invoked his or her rights in order to obtain

statements that could be used for impeachment at trial. See id. at 1627. In reaching its conclusion that the defendant's statements were coerced, the court stated:

> It is apparent that Detective Bennett was attempting to capitalize on the rule stated in Harris v. New York, which allows the use of statements taken in violation of the prophylactic Miranda rules to impeach conflicting testimony by the defendant, even though the statements are not admissible in the prosecution's case in chief. But if the accused's statements are involuntary, the Supreme Court has mandated the exclusion of such evidence for all purposes, including impeachment.
>
> This is a very troubling case, presenting a deliberate police violation of Miranda coupled with a misrepresentation to [the defendant] about the legal consequences of that violation.
>
> . . . .
>
> We exercise independent review of the uncontradicted evidence and are compelled to conclude that under these circumstances, [the defendant's] statements were coerced and involuntary, and should not have been introduced to impeach his trial testimony. The fact that he did not actually confess to the crime does not change the result. His statements were the product of illegal police coercion.

21 Cal. App. 4th at 1627-28 (citations omitted).

In the case before this court, the state trial court found that officers Machen and White intentionally violated petitioner's Miranda rights in order to obtain petitioner's statements for possible use in impeaching him if he testified at trial. (Reporter's Augmented Tr. at 4.) The court found, however, that petitioner's statements "were voluntary and not the result of coercion." (*Id.*) In this habeas proceeding, the court must review de novo the state trial court's legal conclusion that the police officers did not coerce petitioner's statements and did not thereby render petitioner's statements involuntary. See Derrick, 924 F.2d at 818; Collazo, 940 F.2d at 415.

Two officers interviewed petitioner. (CAT at 12.) During the interview, Sheriff's Detective White initially questioned petitioner about such matters as his address, possible disposition of his car, his ex-wife's name, address and telephone number, the keys that were in petitioner's car, his place of birth, place of employment, job title, work

telephone number, and Social Security number. (CAT at 12-13.) When petitioner was asked whether he had ever been arrested before, petitioner responded, "No sir." (CAT at 13.) After additional questions about whom to notify in case of an emergency, how long petitioner had been divorced, and another telephone number, Detective White told petitioner that he was under arrest for murder and then advised him of his rights. (CAT at 14.) Petitioner responded by asking if he could have his lawyer there, then said he probably should have a lawyer, and finally confirmed that he wanted an attorney. Detective White asked, "Why did you shoot him anyway?" When petitioner responded "Pardon?" the officer asked "Why did you shoot him?" (CAT at 14.) The officers proceeded to interrogate petitioner for about an hour. (CAT at 14-33.)

In response to the officer's initial questions as to why he shot Withrow, petitioner said that Withrow had cheated him out of money, that he was losing his property, that he couldn't figure out how much money was at issue,

and that he had written checks to Withrow. (CAT at 34.) He interrupted himself to ask whether he was supposed to keep talking without an attorney, whereupon Detective White interrupted him to say, "Listen, what you tell us we can't use against you right now." (CAT at 4.) Petitioner responded "Okay," and the officer said. "We'd just like to know." (Id.) Petitioner then embarked on an account that began "It started two years ago after the divorce" and included not only information about petitioner's dealings with Bill Withrow but also petitioner's divorce, his property, his automobile accident and head injury, his job, his guns, his children, deer hunting, an old vehicle his brother-in-law was fixing, Viet Nam, taking his trailer up in the woods, and his ambition to be a highway patrolman. (CAT at 4-22.) Petitioner's statements were rambling, disjointed, often unresponsive to the questions asked by the officers, sometimes virtually incoherent, and occasionally inaudible.

The two threshold questions that invited petitioner's statements were plainly focused on petitioner's motive and

intent: "Why did you shoot him anyway" and "Why did you shoot him." (CAT at 14.) Later the officer asked yet another question addressed to petitioner's intent: "So this morning when you were just going over there to scare him?" (CAT at 23.) Shortly thereafter the officer asked, "When you got over to the office what happened?" (Id.) Petitioner's answer was not responsive. The officer then made a comment concerning petitioner's intent: "Well it sounds to me like you lost control of it for a while. Ah ah (inaudible) from what you've told us so far your intentions wern't [sic] to go over there wasn't to shot [sic]." (CAT at 24.) A few minutes later the officer said, "Getting back to the weapons. What transpired today (inaudible) when Bill ah standing up or sitting down when this all started?" (CAT at 27.) Toward the end of the interrogation, the officer said, "The way this was handled after this happened and you left and went over to (inaudible)" and asked "Any reason why you went to Baseline." (CAT at 31.)

Officer White's statement that "what you say can't be used against you right now" was designed to undermine petitioner's exercise of his right to control the time at which questioning occurred, the subjects discussed, and the duration of the interrogation. The officer's statement was intended to convey the impression that any statements made by petitioner would not be used against him at all. The further statement that "we just want to know" reinforced that impression by suggesting that the officers merely sought to satisfy their curiosity. Accordingly, this court finds that petitioner's will was overcome by the officers' tactics and that he continued to talk to the officers only as a result of their use of deception.

While the mere use of deception by a police officer does not render a confession involuntary, see Frazier v. Cupp, 394 U.S. 731, 737-39 (1969), deception used as it was here, to deprive the defendant of his Fifth Amendment rights, may render a defendant's statement involuntary. Petitioner was tricked into making a statement outside the

presence of counsel. Petitioner's self-direction was lost when the officers assured him that any statements he made to them could not be used against him "right now" and that they "just wanted to know." As a result, petitioner's statements were not the product of a rational intellect but resulted from psychological coercion. The clear purpose of the officers' tactics was to make the defendant talk and to keep him talking in the hope that he would make statements that could be used to impeach him at trial concerning his intent.

Respondents assert that Officer White's statements must be interpreted in light of his undisclosed knowledge that the defendant's statements could, in fact, be used for impeachment purposes. Under that interpretation, respondents argue, the phrase "right now" renders the statement technically correct because the statements could be used against petitioner only "later." This interpretation is unpersuasive. Any use of petitioner's statements, whether for purposes of the officers' arrest report, an information, a

preliminary hearing, or trial, would necessarily occur "later" rather than "right now." Moreover, even if the officer's statement could be deemed technically correct by virtue of his understanding that petitioner's statements could be used only for impeachment, the officer's non-disclosure of this material fact, or his utterance of a half-truth, was the equivalent of a complete misrepresentation. The words spoken by Officer White "were calculated to pressure [petitioner] into changing his mind about remaining silent, and into talking without counsel to his interrogators." Collazo, 940 F.2d at 416. This pressure rendered petitioner's statements involuntary.

This court also finds that petitioner's statements to the police are of dubious reliability for the purpose for which they were offered and admitted at trial. The statements were offered to impeach petitioner's assertion of self-defense by showing that he did not mention self-defense during the interview with police. However, the officers did not conduct a structured interview but rather asked questions designed to

keep petitioner talking after he requested an attorney. Petitioner rambled and cried at times during the interview. It is questionable whether, under these circumstances, petitioner provided a complete or accurate account of his actions or his motives.

The reliability of petitioner's statements to the police is further undercut by the fact that they do not directly contradict and may not even "contrast sharply" with petitioner's testimony at trial. Cf: Harris, 401 U.S. at 225. In the interview and at trial, petitioner stated that he went to Withrow's office to scare him. (CAT at 21; RT at 1076-77.) In the interview and at trial, petitioner said he was afraid of Will Estey. (CAT at 22, 29; RT at 1062.) The fact that petitioner did not mention self-defense to the officers during their improper interrogation does not directly contradict petitioner's defense and therefore does not justify use of petitioner's statements for impeachment purposes. In the absence of evidence that petitioner "affirmatively resort[ed] to perjurious testimony" when he claimed

self-defense, use of petitioner's statements for impeachment purposes does not serve the purpose advanced for the exception to the exclusionary rule. See Harris, 401 U.S. at 224.

Even if petitioner's statements could be deemed both voluntary and reliable, the statements should not have been admitted for purposes of impeachment in this instance because such admissibility encourages the very police misconduct that occurred in this case. Officer Machen testified that he "quite often," indeed "quite regularly," continues to question suspects after invocation of their rights because he is aware that such statements can be used for impeachment purposes and it is his understanding that he can continue to question a suspect after the suspect requests a lawyer. (CT at 408-12, 415-16.)

In Bey, the California Court of Appeal observed that it is not a new tactic to attempt to take statements in violation of the prophylactic Miranda rules in order to impeach conflicting testimony by the defendant. 21 Cal.

App. 4th at 1627. Some five years prior to the Bey decision, Justice Mosk criticized the Harris rule for opening the door to this tactic:

> [T]he Harris rule does not carry sufficient deterrence. In cases in which the police believe they can obtain the evidence they seek only by violating the law, the Harris rule practically invites unlawful conduct by allowing the prosecution to use the evidence for impeachment. By contrast, a broad exclusionary rule deters such improper police conduct by denying the prosecution any benefit that might flow therefrom.
>
> The harm threatened by the Harris rule has not escaped the notice of commentators. One has asserted that "Harris permits law enforcement officials to obtain confessions or statements directly related to the issue of guilt by illegal means and hold such evidence as a warning to the accused not to take the stand and contradict his prior utterance." Why the police may act in this fashion is plain: "it is widely acknowledged that a defendant—at least one without a criminal record—who takes the witness stand and tells his story has a considerably better chance of acquittal than one who stands mute."
>
> Professors Dershowitz and Ely also observe that "The Miranda situation is . . . tailor-made for a sequential 'try it legally—if you fail, try it illegally' approach. That is, the police can attempt to obtain a statement

> admissible in the case in chief by giving the required warnings. If, however, the suspect requests a lawyer, they can then (instead of honoring the request and thereby losing the statement) go on——given Harris——to try far an uncounselled statement to use for impeachment."
>
> . . . . "By thus restoring the value of statements obtained without warning suspects of their rights, Harris may well encourage police to ignore Miranda."
>
> Regrettably, the fear that Harris may encourage unlawful police conduct has been fulfilled.

People v. May, 44 Cal. 3d 309, 333-34 (1988) (Mosk, J., dissenting) (citations omitted).

In the instant case, the likelihood that admissibility of petitioner's statements would encourage police misconduct is not a mere speculative possibility. The officers admitted that they habitually engage in such misconduct in order to obtain incriminating statements that can be used for impeachment. To admit petitioner's statements in this context can only encourage law enforcement officers to continue to resort to unacceptable tactics to circumvent

Miranda. See Pope v. Zenon, 69 F.3d 1018, 1024 (9th Cir. 1995) (citing Collazo, 940 F.2d at 4~3).

C. Effect of the Statements on the Jury's Verdict

Having determined that petitioner's statements to the police officers were involuntary and therefore inadmissible for any purpose, the court must now decide whether admission of the statements for purposes of impeachment was harmless error. See Arizona v. Fulminante, 499 U.S. 279, 295 (1991) (holding that a harmless error analysis applies to coerced confessions); Pope, 69 F.3d at 1025. "But, we conduct this analysis with an awareness that 'a confession is like no other evidence'" and may have a "'profound impact'" on the trier of fact. Pope, 69 F.3d at 1025 (quoting Fulminante, 499 U.S. at 296). Since a defendant's confession "is probably the most probative and damaging evidence that can be admitted against him," Fulminante, 499 U.S. at 296, a careful review of the record must be undertaken to determine whether the

improper admission of petitioner's statements had a substantial and injurious effect on the verdict in his case.

Petitioner testified at trial as follows:

> Petitioner had seen Bill Withrow with guns at home and at the office. (RT at 1051-52.) Once he went to Withrow's office to pick up a check and, when he found the check was not in the amount he expected, he grabbed Withrow's tie. After he released Withrow's tie, Withrow told him he was lucky that something hadn't happened and that if something like that ever happened again, he'd have something for him. (RT at 1052-54.) When petitioner asked Withrow if he was talking about the gun he kept in his desk, Withrow didn't respond but had "a smerky [sic] grin on his face." (RT at 1054.) Petitioner had been told that a man named Estey, who was one of Withrow's associates, was a Hell's Angel and was involved with drugs. (RT at 1054, 1061-62.) Petitioner was afraid of both Estey and Withrow. (RT at 1062.)
>
> On September 6, 1988, petitioner called in sick. He began to get his camping gear together for a trip he planned to take later that week, and he intended to put a rebuilt carburetor in his truck that day so it would be ready for the trip. (RT at 1067.) During that morning, petitioner called Withrow to find out if he had sold some stock he was supposed to sell for petitioner. (RT at 1068.) After Withrow's secretary put petitioner on hold

twice, Withrow came on the line and said he was busy and he'd call petitioner back. (RT at 1069.) Petitioner was angry at being put off again. He went to his bedroom and got two of his guns. (RT at 1070.)

Petitioner, who bought his first handgun when he was thirteen, had had one of the guns since 1972 and the other since about 1983 or 1984. (RT at 1070-71.) In the military, petitioner had learned to shoot with either hand. (RT at 1071.) He kept his guns loaded at the house for protection and because of his fear of Hells Angels and Withrow. (Id.) He put the guns in his briefcase, dressed, and took the briefcase out to his car. (RT at 1071-73.) He was not thinking about killing Withrow and was not thinking about a plan to go kill Withrow but took the guns to protect himself from Withrow and his Hells Angel friends. (RT at 1073-74.) Petitioner also put the carburetor from the pickup in the back of the car. (RT at 1073-75.) During the drive to Withrow's office, petitioner was not thinking about killing Withrow, but he was very mad at him and intended to scare him by yelling at him. (RT at 1076-77.) He took the guns with him to protect himself because he knew Withrow had a gun in the office and it was possible that Estey might be there. (RT at 1075, 1077.)

Petitioner drove to Withrow's office and was sent in by Withrow's secretary. (RT at 1077-79.) Petitioner did not close the door to Withrow's office because he was planning to yell at Withrow and try to embarrass him or

humiliate him in front of the people who worked in the building. (RT at 1079.) He was not planning to kill Withrow. (RT at 1079-80.) He put his briefcase in a chair and unsnapped the latches but didn't open the briefcase. (RT at 108081.) Withrow asked petitioner to shut the door, and petitioner refused. He said he wanted everybody in the building to hear what he had to say to him and what he was going to call him. (RT at 1081.) Then petitioner started yelling at Withrow. (RT at 1082.) Withrow said they were making money, and he rolled back from the desk to open a file cabinet on his left. (RT at 1083.) Withrow grabbed a folder and threw it towards petitioner, and it landed on the desk in front of petitioner. (RT at 1084.) Petitioner said he couldn't believe anything in the folder, whereupon Withrow laughed or smiled. (RT at 1085.) Petitioner asked Withrow if he thought it was funny, and Withrow replied that no one was going to keep him from being famous. (RT at 1086.) Withrow reached for the drawer where petitioner believed he kept a gun. (RT at 1086-87.) Petitioner thought Withrow was reaching for a gun in the drawer. He went for his own guns because he thought Withrow was going to take his gun out and shoot him. (RT at 1087.) Petitioner did not shoot Withrow just because he was angry, nor did he shoot Withrow just because Withrow owed him money. (RT at 1088.) Petitioner grabbed both guns because of his military training, where he had learned that in a life or death situation you don't spare ammunition,

> because a wounded man can kill you. (RT at 1090.)

After petitioner testified, the prosecution called Detective Machen as a rebuttal witness and introduced the tape-recorded interview of petitioner to show that petitioner did not tell the police officers that he killed Withrow in self-defense and did not say that he believed Withrow was reaching for a gun the day that petitioner shot him. (RT at 1341-43.) In closing argument the prosecutor referred the jury to the interview transcript and argued that during the interrogation petitioner "couldn't give an answer why he took those guns or he didn't want to admit why he took them." (RT at 1462.) He referred to petitioner's reason for shooting Withrow as "the crux of this case." (Id.)

The prosecutor's use of the improperly admitted statements goes to the root of the state's burden to prove beyond a reasonable doubt that petitioner did not act in self-defense and did act with the intent required for a conviction of first or second degree murder. This use of the

inadmissible statements had a substantial effect on the verdict. No other evidence of motive or intent could have impressed the jury in the same way that petitioner's own statements did. This court cannot conclude that the error in admitting petitioner's statements was harmless.

II. Right to Privacy Claim

Petitioner's second claim was presented to the California Supreme Court for the first time in a habeas petition. Respondents contend that the claim is procedurally barred.

Based on concerns of comity and federalism, federal courts will not review a habeas petitioner's claim if the state court decision denying relief on that claim rests on a state law ground that is independent of federal law and adequate to support the judgment. See Coleman v. Thompson, 501 U.S. 722, 729 (1991); Harris v. Reed, 489 U.S. 255, 260-62 (1989). Generally, the only state law grounds meeting these requirements are state procedural rules. However, the state procedural rule relied upon is not

adequate if the rule appears to be discretionary. See Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992). Moreover, failure to follow state procedures will warrant withdrawal of a federal remedy only if those procedures provided the habeas petitioner with a fair opportunity to seek relief in state court. See id.,; see also Kim v. Villalobos, 799 F.2d 1317, 1321 (1986). In addition, if the state court "fails to articulate that state procedural grounds form an independent basis for the decision so that the federal court is left to conjecture concerning whether the matter was disposed of on a separate and independent state ground, the decision will be insufficient to bar federal review." Karis v. Vasquez, 828 F. Supp. 1449, 1460 (E.D. Cal. 1993); see also Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994), cert. denied, 115 S.Ct. 1175 (1995).

In this case, the California Supreme Court denied petitioner's application for a writ of habeas corpus with citations to In re Waltreus, 62 Cal. 2d 218, cert. denied sub nom. Waltreus v. California, 382 U.S. 853 (1965), and In

re Dixon, 41 Cal. 2d 756 (1953). In Waltreus the court held that claims raised on direct appeal cannot ordinarily be relitigated in a subsequent collateral challenge to the conviction. 62 Cal. 2d at 225. Since petitioner did not raise his privacy claim on direct appeal, the citation to Waltreus is not applicable to petitioner's privacy claim.

In Dixon, the California Supreme Court held that "habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." In re Dixon, 41 Cal. 2d at 759. Thus, in citing Dixon, the California Supreme Court denied petitioner's privacy claim as procedurally barred. For purposes of procedural default analysis, however, a discretionary state rule cannot bar federal habeas corpus review. See Siripongs, 35 F.3d at 1318. The rule of Dixon is, by its terms, discretionary. It admits of the possibility of "special circumstances

constituting an excuse" for failure to raise a claim by way of direct appeal; when such circumstances are found, the California Supreme Court may entertain the claim. See Karis, 828 F. Supp. at 1462-63. Consequently, the citation to Dixon is not adequate to bar federal habeas corpus review of petitioner's privacy claim.

The court turns to the merits of petitioner claim that the trial court's admission of his statements to Dr. Sander violated petitioner's constitutional right to privacy.

On the third day of trial, the prosecutor requested admission of statements made by petitioner to Dr. Sander in April of 1988. (CT at 430-38.) The court held a hearing on the admissibility of the statements; both petitioner and Dr. Sander testified. (CT at 429.)

Dr. Richard Alan Sander testified that he is a medical doctor, that his various specialties include occupational medicine, that he is not a licensed psychiatrist or therapist, and that he was employed at McClellan Air Force Base as chief of occupational medicine services from

approximately February of 1988 to about August of 1989. (RT at 102-05.) On April 21, 1988, Dr. Sander interviewed petitioner in his office. (RT at 114-15.) Dr. Sander took notes of the interview but did not file them in petitioner's of official medical records because of the personal nature of the interview. (RT at 118-19, 137.) When an employee came to the clinic to talk about stress on the job, Dr. Sander did not perform a physical examination but rather talked to the person to triage the person's mental condition and determine whether the person should return to work, go home, or seek professional care. (RT at 125-26.) Dr. Sander had some psychiatric training in medical school and also had some training in counseling. (RT at 126.) Petitioner came to the clinic because he was having some emotional dysfunction and was referred by his supervisor, Joe Lambert. (RT at 128.) Mr. Lambert had called the clinic and indicated that petitioner was "about to explode." (RT at 129.) At the conclusion of the interview with petitioner, Dr. Sander recommended that he go see a psychiatrist. (RT at 142.)

Petitioner testified that Joe Lambert, his supervisor at McClellan Air Force Base in April of 1988, became concerned about him after he walked off the job and was absent for a couple of days. (RT at 146-48.) Lambert advised petitioner to talk to someone at the base clinic. (RT at 148.) Petitioner went to the clinic and was interviewed by Dr. Sander, whom he had not seen previously. (RT at 150.) The interview took place in an office, and the doctor took notes. (RT at 151.) When Lambert referred petitioner to the clinic, petitioner thought he was going to see "a base shrink," and he believed that he was talking to a psychiatrist when he discussed his mental problems with Dr. Sander. (RT at 152.) Petitioner had seen a psychiatrist once before, and the interview with Dr. Sander was similar to his previous visit to a psychiatrist. (RT at 151-59.)

The defense opposed introduction of Dr. Sander's testimony and notes on the ground that the matter was privileged under state law recognizing a psychotherapist-patient privilege. (RT at 174-80.) The trial

court found that Dr. Sander was a medical doctor and that Dr. Sander did not devote a substantial portion of his time to the practice of psychiatry. The court also found that it was not reasonable under the circumstances for petitioner to believe that Dr. Sander was a psychiatrist. Accordingly, the court ruled that the records and communication at issue were not privileged under California Evidence Code § 1014, which defines the state psychotherapist-patient privilege.[2/] (Reporter's Augmented Tr. at 5-6.) At trial, Dr. Sander was called by the prosecution. (RT at 855.) The prosecution was allowed to introduce Dr. Sander's notes, which revealed that petitioner was suffering from stress and said he felt like

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2. California law provides that, "[e]xcept as otherwise provided by statute . . . [n]o person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing." Cal. Evid. Code § 911. The privileges contained in the California Evidence Code are exclusive, and California courts are not free to create new privileges as a matter of judicial policy. See Valley Bank of Nevada v. Superior Court, 15 Cal.3d 652, 656 (1975); Garstang v. Superior Court, 39 Cal.App.4th 526, 532 (1995). There is no general physician-patient privilege in a criminal proceeding. Cal. Evid. Code § 998. The definition of "psychotherapist" for purposes of the psychotherapist-patient privilege does not include a physician unless the physician "devotes, or is reasonably believed by the patient to devote, a substantial portion of his or her time to the practice of psychiatry." Cal. Evid. Code § 1010.

killing various people he worked with at the base and "the real estate agent who cheated him." (RT at 866, 871-73, 877-78, 880-83.)

Petitioner contends that admission of his statements to Dr. Sander harmed him because, aside from the statements to police that should have been suppressed, the statements to Dr. Sander were the only concrete evidence that petitioner's motive for killing Withrow might have been revenge rather than self-defense. Petitioner argues that the federal constitution protects an individual's interest in avoiding disclosure of personal matters including medical information, and that the right of privacy protecting doctor-patient communications may be breached only upon a showing of a compelling state interest. According to petitioner the government made no showing of a compelling state interest in the disclosure of petitioner's interview with Dr. Sander, and the trial court did not balance petitioner's right of privacy against the state's request for disclosure; rather, the trial court relied on its determination that the

communication was not privileged because Dr. Sander was not a psychiatrist nor a psychotherapist. Petitioner concludes that he was prejudiced by the trial court's ruling because it enabled the prosecutor to use Dr. Sander's testimony to impugn petitioner's assertion that he killed Withrow in self-defense.

The right of privacy exists under the federal constitution and finds its roots in the First, Fourth, Fifth, and Ninth Amendments, as well as in the penumbra of the Bill of Rights and in the concept of liberty guaranteed by the Fourteenth Amendment. See Roe v. Wade, 410 U.S. 113, 152 (1973). Although the right of privacy is not expressly protected, a "claim of error based upon a right not specifically guaranteed by the Constitution may nonetheless form a ground for habeas relief where its impact so infects the entire trial that the resulting conviction violates the defendant's right to due process." Hines v. Enomoto, 658 F.2d 667, 672 (9th Cir. 1981) (citing Quigg v. Crist, 616 F.2d 1107 (9th Cir.), cert. denied, 449 U.S. 922 (1980));

see also Lisenba v. California, 314 U.S. 219, 236 (1941). In order to raise such a claim in a federal habeas corpus petition, the error alleged must have resulted in "a complete miscarriage of justice." Hill v. United States, 368 U.S. 424, 428 (1962). See also Crisafi v. Oliver, 396 F.2d 293, 294-95 (9th Cir.), cert. denied, 393 U.S. 889 (1968); Chavez v. Dickson, 280 F.2d 727, 736 (9th Cir. 1960), cert. denied, 364 U.S. 934 (1961).

The Ninth Circuit Court of Appeals has found a "substantial constitutional right of privacy that extends to psychotherapist-patient communications" in civil actions, see Caesar v. Mountanos, 542 F.2d 1064, 1067 n.9 (9th Cir. 1976), cert. denied, 430 U.S. 954 (1977) but the right is "conditional rather than absolute" and may be impaired. In Re Grand Jury Proceedings, 867 F.2d 562, 564-65 (9th Cir.) (declining to recognize psychotherapist-patient privilege), cert. denied sub nom Doe v. United States, 493 U.S. 906 (1989).

The United States Supreme Court has recently recognized a psychotherapist-patient privilege. Jaffee v. Redmond, ___ U.S. ___, 116 S. Ct. 1923 (1996) (abrogating In re Grand Jury Proceedings, 867 F.2d 562, and other court of appeals decisions declining to recognize a psychotherapist privilege under Rule 501). The Jaffee court acknowledged the "'fundamental maxim that the public . . . has a right to every man's evidence.'" 116 S. Ct. at 1928 (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)). Thus, any examination of a claim of privilege must "'start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.'" Id. Such exemptions are justified where a public good transcends the principle of using all rational means for ascertaining the truth. See id. (citing Trammel v. United States, 445 U.S. 40, 50 (1980)). "[A] privilege protecting confidential communications between a psychotherapist and her patient

'promotes sufficiently important interests to outweigh the need for probative evidence.'" Id., (quoting Trammel, 445 U.S. at 51). Accordingly, "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." Id. at 1931.

The Court looked exclusively to the Federal Rules of Evidence for authorization to recognize a patient-psychotherapist privilege:

> Rule 501 of the Federal Rules of Evidence authorizes federal courts to define new privileges by interpreting "common law principles . . . in the light of reason and experience." The authors of the Rule borrowed the phrase from . . . in Wolfle v. United States, 291 U.S. 7, 12 (1934), which in turn referred to the oft-repeated observation that "the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." The Senate Report accompanying the 1975 adoption of the Rules indicates that Rule 501 "should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis."

116 S. Ct. at 1927 (citations and footnotes omitted).[3/] The Court expressly rejected any balancing of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure." Id. at 1932. Such a balancing component would eviscerate the effectiveness of the privilege, for "'[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'" Id. (quoting Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)).

The therapy relationship at issue in Jaffee involved counseling provided by a licensed clinical social worker to a police officer. Id. at 1926. Although "all 50 States and

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3. Rule 501 provides only a general rule regarding privilege: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. The Federal Rules of Evidence apply to civil and criminal cases and proceedings. Fed. R. Evid. 1101 (b). "The rule with respect to privileges applies at all stages of all actions, cases, and proceedings." Fed. R. Evid. 1101(c).

the District of Columbia have enacted into law some form of psychotherapist privilege," the states have diverged on the types of therapy relationships protected and the exceptions recognized. Id. at 1929-30 & n.13. The Supreme Court concluded that the reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a licensed social worker. Id. at 1931. The Court declined to delineate the full contours of the newly recognized privilege but noted, "[We do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." Id. at 1932 n.19.

The aspects of Jaffee summarized above, i.e., the analysis of the patient-psychotherapist privilege in evidentiary rather than constitutional terms, affirmation of the general rule disfavoring testimonial privileges, rejection of any balancing of a patient's interest in privacy against the evidentiary need for disclosure, and the holding that the

newly recognized patient-psychotherapist privilege is not absolute, lead this court to conclude that petitioner's challenge to the admissibility of Dr. Sander's testimony and notes must be analyzed as an objection to a state court's evidentiary ruling. Violation of a state evidence rule does not constitute grounds for federal habeas corpus relief absent a due process violation that renders the trial fundamentally unfair. See Jammal v. Van de Kamp, 926 F.2d 918, 919-20 (9th Cir. 1991). See also Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Pulley v. Harris, 465 U.S. 37. 41 (1984). Thus, whether petitioner's privacy claim is a claim of error based on a right not specifically guaranteed by the Constitution or a claim of error in the application of state law, petitioner cannot prevail except upon a showing of fundamental unfairness or complete miscarriage of justice. This court finds that petitioner has not made such a showing.

At petitioner's trial, Catherine Carter and Cathy Raymes both testified that petitioner had complained to them about Withrow's handling of petitioner's money and

property. (RT at 436, 443, 899-900.) Cathy Raymes further testified that petitioner commented to her, six or seven weeks before Withrow was killed, that he or somebody should do the world a favor and kill Bill Withrow, and he said he was surprised that no one else had done it before. (RT at 90305.) Thus, Dr. Sander's testimony did not constitute the only evidence that petitioner had said he felt like killing Withrow, nor did his testimony provide the only evidence that petitioner could have been motivated by revenge. On this record, the court finds that petitioner has failed to demonstrate that the admission of Dr. Sander's testimony and notes so fatally infected petitioner's trial as to render it fundamentally unfair or that the violation of petitioner's privacy resulted in a complete miscarriage of justice. Accordingly, petitioner is not entitled to relief on his second claim.

For the reasons set forth above, IT IS HEREBY RECOMMENDED that

1. Petitioner's application for a writ of habeas corpus be granted; and

2. A writ of habeas corpus be issued commanding the State of California to vacate and set aside petitioner's conviction of second degree murder with personal use of a firearm in the case of People v. Bobby Gene Henry, case number 87841 of the Superior Court of the County of Sacramento, unless, within sixty days of the entry of judgment herein, the State of California grants petitioner a new trial in which petitioner's statements to police on September 6, 1988, are not admitted as evidence for any purpose.

These findings and recommendations will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file and serve written objections with the court. The document should be captioned "Objections to Findings and Recommendations."

Any reply to objections shall be filed and served within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). DATED: June 5, 1997.

/S/

UNITED STATES MAGISTRATE JUDGE

JFM:kw
henr2055.157

FILED
NOV 2 1 1997
Clerk, U.S. District Court
Eastern District of California
By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
CALIFORNIA

BOBBY GENE HENRY

Plaintiff, No. CIV S-95-2055
DFL-DAD-P

v.

PEGGY KERNAN, et al., ORDER

Defendants.

Petitioner, a state prisoner, has filed this application for a writ of habeas corpus under 28 U.S.C. § 2254. The matter was referred to a United States magistrate judge under 28 U.S.C. § 636 (b)(1)(B) and Local General Order No. 262.

On June 6, 1997, the magistrate judge filed findings and recommendations. Respondents have filed objections to the

findings and recommendations, and petitioner has filed a reply.

I have conducted a de novo review of this case. I have read all of the pleadings, the relevant portions of the trial transcript, the record of the suppression hearing and the decision by the state trial judge, the opinion of the Court of Appeal, and the findings and recommendations. I have listened to the relevant portions of the tape recording of the interview that is at issue.

The facts and the standard of review are correctly set forth in the findings and recommendations. Every judicial officer who has examined this case has been troubled by the deliberate violation of the petitioner's request that the interrogation terminate so that he could consult with an attorney. Beyond suppression of evidence, such a practice could subject the Sheriff's Deputies to internal discipline or to a civil suit for damages, see Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992). In addition, the Sheriff's Department may be subject to a suit for injunctive relief if the Deputies'

practice in this case is the policy of the Sheriff's Department.

But the question here is whether the Deputies' conduct was such that petitioner's statement were involuntary and therefore inadmissible for impeachment purposes under Harris v. New York, 401 U.S. 222 (1971). After Miranda warnings were given to petitioner the following exchange occurred:

[Officer}: You understand your rights Bobby?

Henry: I think so.

. . . . . .

[Officer}: . . . You have any questions about your rights?

Henry: . . . can I have my lawyer here, I don't know.

[Officer}: That's ah up to you; you're entitled to have an attorney present before you're questioned.

Henry: Right. Probably should have one now.

[Officer}: You do want an attorney?

Henry: Yes, please

[Approximately 25 second pause. No one speaks.]

[Officer}: Why did you shoot him.

Henry: Cheated me out of money, I was loosing [sic] my property.

[Officer}: How much money you talking about.

Henry: I couldn't figure it out, it was so scrambled up, I think it was, I don't know, like, maybe fifty thousand.

{Officer}: How—how did he have your money, anyway

Henry: I gave it to him

{Officer}: Was it cash you gave to him.

Henry: I wrote him checks. Am I supposed to keep taking [sic] without an attorney. Was I—

[Officer}: Listen, what you tell us we can't use against you right now.

Henry: Okay.

[Officer]: We'd just like to know.

This discussion occurred in a relaxed setting in a room in administrative offices of the Sheriff's Department. All of the participants, including petitioner, spoke in a quiet, matter of fact tone of voice. The two officers who participated were not in uniform. The petitioner was not handcuffed. The interview went on for approximately one hour, and was tape recorded in its entirety.

The officers ignored Henry's request for counsel and, when Henry seemed to hesitate, they told him "what you tell us we can't use against you right now" and "we'd just like to know." The State Court of Appeal concluded that this conduct was not sufficiently overbearing or misleading to render Henry's statements involuntary in the circumstances. I agree with the reasoning of the State Supreme Court and cannot improve upon it:

> A major flaw in defendant's reasoning is that his most incriminating statement, his assertion that he shot Withrow because he was losing his money and Withrow was cheating him, was made before the officers suggested defendant's statements would not be used against him. Thus, this evidence was not the result of the officers' deception.

> The use of deceptions by interrogating officers may render a defendant's statement involuntary. However, the deception must be of a type which would be reasonably likely to procure a false confession. [citation omitted] We see nothing in the facts of this case which suggest the officer's statements would have caused defendant to confess falsely. The statements of the officers do not have the appearance of an action which would have overcome defendant's resistance and broken his free will.
>
> In effect, all the officers did was to negate the prior Miranda warning, so that it is as though defendant had made his statements without having received the required warnings. It is clear that a statement is not 'involuntary' simply because the warnings have not been given. Those were exactly the facts of Harris in which the court held the statements were admissible for impeachment. [citation omitted]
>
> . . . .
>
> Had the officers employed a variety of emotional manipulations, including improper threats and promises or other coercive methods, their acts might be significant. However, this was not the case. The questioning lasted only an hour and the officers never made improper promises of leniency or threats of more harsh treatment. They took no actions to pressure defendant into confessing.

Court of Appeal opinion at 8-9, Resps.' Ex. 1.

Both Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992), and Collazo v. Estelle, 940 F.2d 411 (9th Cir. 1991) (en

banc), relied upon by petitioner, involved much more egregious conduct and different factual and legal circumstances.

For the reasons stated above and by the State Court of Appeal, the court finds that the statements by Henry to Sheriff's Deputies Machen and White were not involuntary.[1/] The court adopts the discussion in the findings and recommendations concerning petitioner's claim that the admission of his statements to Dr. Sander violated a constitutional right to privacy.

Accordingly, IT IS SO ORDERED that:

1. The findings and recommendations filed June 6, 1997, are adopted in part and rejected in part as noted above;

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1. Alternatively, even if the statements that followed the misleading statements by the officers were involuntary, these statements were of no consequence at the trial. Indeed, the prosecutor mainly emphasized what Henry had not said to the Deputies concerning self-defense as opposed to what he had said. As to admissions as contrasted to omissions, it was Henry's initial admission that he shot Withrow because Withrow had cheated him which was probative, and this statement came before the officers suggested that his statements could not be used "right now."

2. Petitioner's petition for a writ of habeas-corpus is DENIED.

Dated: 19 November 1997.

/s/

DAVID F. LEVI
United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOBBY HENRY,
Petitioner-Appellant,
v.
PEGGY KERNAN, Warden; DANIEL E. LUNGREN, Attorney General,
Respondents-Appellees.

No. 98-15768

D.C. No.
CV 95-02055-DAD

ORDER AND
AMENDED
OPINION

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
January 12, 1999—San Francisco, California

Filed May 26, 1999
Amended October 25, 1999

Before: Joseph T. Sneed, A. Wallace Tashima, and
Barry G. Silverman, Circuit Judges.

Opinion by Judge Tashima

SUMMARY

Criminal Law and Procedure/Evidence

The court of appeals reversed a judgment of the district court. The court held that a defendant's confession is involuntary and inadmissible at trial for any purposes when it follows psychologically coercive questioning and unheeded requests for counsel.

Appellant Bobby Henry was arrested for killing Bill Withrow. Following his arrest, he was questioned for several hours by Detectives White and Machen. The detectives continued to question Henry after he requested counsel. His statements to the police were rambling, disjointed, often unresponsive to the questions, occasionally inaudible and sometimes virtually incoherent. Throughout the interview he was shaken, confused and frightened, crying in parts and frequently asking for forgiveness. At one point, Detective White told Henry that "what you say can't be used against you right now" and further commented, "we just want to know."

In response to this further questioning, Henry gave a detailed confession.

Henry was tried for murder. His first trial ended in mistrial. At a hearing in the second trial, Henry sought to suppress his post-*Miranda* statements to the detectives on the ground that the questioning violated his Fifth Amendment right to silence and his right to counsel. The state court agreed that the statements violated *Miranda* and excluded them from the prosecutor's case in chief. The court found, however, that the statements were voluntary and could be used to impeach Henry if he testified.

Prior to the killing, Henry confided in Dr. Sander, a physician whom he believed to be a psychotherapist, that he felt like killing Withrow and a number of other people. At the state court hearing, Henry also sought to exclude the doctor's testimony on the ground that it was covered by the California psychotherapist-patient privilege. The court held that the privilege did not apply because it was unreasonable for Henry to believe that Dr. Sander was a psychotherapist.

Two other witnesses testified that Henry had complained about Withrow and one testified that Henry had commented to her that someone should kill Withrow.

Henry testified that he acted in self-defense and the post-arrest statements were introduced to impeach him. The prosecution called Detective Machen as a witness and played the entire tape recording of Henry's interrogation for the jury. Each juror was also provided with a copy of the transcript of the interview.

Henry was convicted. After exhausting his state court claims, Henry filed a petition for habeas corpus, contending that: (1) his statements to police interrogators were elicited in violation of the Fifth Amendment, were involuntary, and were improperly admitted at trial; and (2) the trial court's admission of his statements to his doctor violated his constitutional right to privacy.

The district court denied his petition for habeas corpus. Henry appealed.

[1] To prevail on his Fifth Amendment claim, Henry had to demonstrate that: (1) his statements were obtained by the police in violation of *Miranda*; (2) the state court committed error in permitting the prosecution to use these improper statements; and (3) the error had a substantial and harmful influence on the jury's determination of its verdict.

[2] It was uncontested that the police deliberately violated Henry's *Miranda* rights by continuing with their interrogation after he unequivocally requested an attorney.

[3] Under the Fourteenth Amendment, a confession is involuntary only if the police use coercive means to undermine the suspect's ability to exercise his free will. Voluntariness depends on such factors as the surrounding circumstances and the combined effect of the entire course of the officers' conduct upon the defendant.

[4] Henry's questioning by the detectives was psychologically coercive. Throughout the interview he was shaken, con-

fused and frightened. [5] White's statements were deliberately designed to undermine Henry's ability to control the time at which the questioning occurred, the subjects discussed, and the duration of the interrogation. Such misleading comments were intended to convey the impression that anything said by Henry would not be used against him for any purposes.

[6] Because the police tactics and trickery produced a confession which was neither rational nor the product of an essentially free and unconstrained choice, Henry's post-*Miranda* statements were involuntary and, therefore, inadmissible for any purpose.

[7] The sheriff's officers set out in a deliberate course of action to violate *Miranda*. [8] In California, out-of-court statements admitted for impeachment are, in fact, admitted for the purpose of proving the defendant's guilt. No limiting instruction was given that Henry's post-*Miranda* statements could be used only to assess Henry's credibility.

[9] The state should not be permitted to use post-*Miranda* statements where the officers set out deliberately to violate a suspect's *Miranda* rights, and the evidence obtained in violation of *Miranda* is used to prove the defendant's guilt, even though it is admitted in the guise of impeachment.

[10] The introduction of Henry's post-*Miranda* statements for impeachment purposes had a substantial and injurious effect on the jury. [11] The prosecution's use of the statements went to the root of their burden to prove beyond a reasonable doubt that Henry acted with the intent required for a conviction of first or second degree murder, and not in self-defense. This had a substantial effect on the verdict. No other evidence could have impressed the jury in the same way that the defendant's own statements did.

[12] There is no constitutional psychotherapy-patient privilege. At best, Henry's challenge to the admissibility of Dr.

Sander's testimony was a challenge to an evidentiary ruling based on state law. [13] A federal habeas court cannot review questions of state evidence law. A federal court will interfere only if it appears that the admission of the evidence violated fundamental due process and the right to a fair trial.

[14] Henry did not make a showing that the admission of Dr. Sander's testimony violated due process or his right to a fair trial. Two other witnesses testified that Henry had complained about Withrow; one of the witnesses testified that Henry told her that someone should kill Withrow. Dr. Sander's testimony was not the only evidence that Henry stated that he felt like killing Withrow.

COUNSEL

Connie M. Alvarez, Assistant Federal Defender, Sacramento, California, for the petitioner-appellant.

Gregory W. Baugher, Assistant Attorney General, Sacramento, California, for the respondents-appellees.

ORDER

The opinion filed May 26, 1999, is amended as follows:

On slip opinion page 5056, following the second full paragraph (177 F.3d at 1158, following the first full paragraph, left-hand column), immediately preceding Part II.B, add the following four (4) paragraphs:

> The State contends, as its fallback position, that Henry's post-*Miranda* statements did not lose their voluntariness until after Henry's inquiry of whether he was "supposed to keep talking without an

attorney," was interrupted by Detective White's statement, "Listen, what you tell us we can't use against you right now . . . We'd just would like to know." By that time, Henry had already made a series of admissions. We recognize, of course, that a post-*Miranda* voluntary statement may be used for impeachment purposes. *See, e.g., Harris v. New York*, 401 U.S. 222, 226 (1971); *Cooper*, 963 F.2d at 1250. Even assuming, however, that the State's fall-back contention would ordinarily have convincing force, there are two factors in this case which, when combined, distinguish this case from past cases.

The first factor is that the sheriff's officers set out in a deliberate course of action to violate *Miranda*. As the State has acknowledged, "it has been conceded that the detectives knew they were violating *Miranda* when they continued questioning the petitioner after he requested counsel . . . ." (State's Petition for Rehearing and Suggestion for Rehearing En Banc at 2-3.) The State's concession is supported by the record. Thus, like *Cooper*, this case is also distinguishable from *Harris* in that

> *Harris* was a case where no claim [was made] . . . that the police knowingly engaged in calculated misconduct in order to secure the disputed evidence. Moreover, it does not appear that the purpose of the police in *Harris* in securing the disputed evidence was to impinge on the suspect's right to remain silent or his right to testify. In these respects, *Harris* is manifestly distinguishable and thus inapposite to the present case.

Cooper, 963 F.2d at 1249 (brackets in the original) (internal quotation marks omitted) (citing *Harris*, 401 U.S. at 224).

The second factor is that in California out-of-court statements admitted for impeachment are also admitted for the truth of the matters asserted therein, *i.e.*, also admitted for substantive purposes. *See* Cal. Evid. Code §§1220, 1235. Thus, in California, out-of-court statements admitted for impeachment are, in fact, admitted for the purpose of proving the defendant's guilt. No limiting instruction was given in this case that Henry's post-Miranda statements could be used only to assess Henry's credibility, the classic use of prior inconsistent statements for impeachment, but not to establish the truth of the matters asserted therein. In fact, in this case, the primary evidence which established Henry's motive and rebutted his claim of self-defense was Henry's post-*Miranda* statements. Thus, it is a misnomer to say that Henry's post-*Miranda* statements were admitted for "impeachment." Their primary use was to establish an essential element of the crime charged, as the prosecution argued.

Based on the specific facts of this case, we conclude that the State should not be permitted to use post-*Miranda* statements where the officers set out deliberately to violate a suspect's *Miranda* rights and the evidence obtained in violation of *Miranda* is used to prove the defendant's guilt, even though it is admitted in the guise of impeachment. Thus, for this further reason, we conclude that the state trial court erred in permitting the prosecution to use Henry's post-*Miranda* statements for the truth of the matters asserted therein, as well as for impeachment as a prior inconsistent statement.

With the foregoing amendment, the panel has voted unanimously to deny the petition for panel rehearing. Judges Tashima and Silverman vote to deny the petition for rehearing en banc and Judge Sneed so recommends. The full court has

been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f).

The petition for rehearing and the petition for rehearing en banc are denied.

OPINION

TASHIMA, Circuit Judge:

We must decide whether a confession concededly obtained in violation of *Miranda*[1] was involuntarily made so as to prohibit its use for impeachment purposes at trial. Contrary to the recommendation of the magistrate judge, to whom the case had been referred, the district court denied habeas relief to Bobby Henry ("Henry"), finding that his Fifth Amendment privilege against self-incrimination and his constitutional right to privacy were not violated. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253, and we reverse and remand.

I.

Henry was arrested for killing Bill Withrow after he turned himself in to the Sacramento County Sheriff's Department. Following his arrest, Henry was questioned for several hours by Detectives White and Machen. The two detectives continued to interrogate Henry after he requested counsel. In response to the detectives' further questioning, Henry made a detailed confession.

An information was filed in the Sacramento County Superior Court charging Henry with murder. The first trial ended in a mistrial after the jury deadlocked. At the second trial, a

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

hearing was held to determine whether Henry's post-*Miranda* statements to the detectives were admissible for impeachment purposes. Henry sought to have his statements suppressed on the ground that the questioning violated his Fifth Amendment right to silence and his right to the assistance of counsel. The state court agreed that the statements violated *Miranda* and excluded them from use during the prosecution's case-in-chief. It found, however, that the statements were voluntary and therefore could be used for impeachment purposes if Henry testified.

Some months prior to the killing, Henry, a civilian employee at McClellan Air Force Base, was referred by his supervisor to Dr. Sander, an occupational health physician on the base. Henry confided in Dr. Sander that he felt like killing a number of people, including Withrow, who had allegedly cheated Henry out of his life savings. At the time of his discussions with Dr. Sander, Henry believed him to be the "base shrink."

At the state court hearing, Henry also sought to exclude Dr. Sander's testimony on the ground that it was covered under the California psychotherapist-patient privilege, Cal. Evid. Code § 1014. Whether Henry had a reasonable belief that Dr. Sander was a psychotherapist was a central issue at the hearing. The trial court ruled that the psychotherapist-patient privilege did not apply because it was unreasonable for Henry to believe that Dr. Sander was a psychotherapist.

Henry testified that he acted in self defense and the post-arrest statements were introduced to impeach him during cross-examination. The prosecution subsequently called Detective Machen as a rebuttal witness and played the entire tape recording of Henry's interrogation for the jury. Each juror was also provided with a copy of the transcript of the interview. Henry was convicted of second degree murder.

After exhausting his claims in state court, Henry filed the instant petition for habeas relief under 28 U.S.C. § 2254. He contends that: (1) his statements to police interrogators were elicited in violation of the Fifth Amendment, were involuntary, and were improperly admitted for any purpose at trial; and (2) the trial court's admission of his statements to his doctor violated his constitutional right to privacy. The district court denied his petition for habeas corpus and issued a certificate of probable cause.[2] Henry timely appealed.

II. Fifth Amendment Claim

The district court's decision to grant or deny a § 2254 habeas petition is reviewed de novo. *See Eslaminia v. White*, 136 F.3d 1234, 1236 (9th Cir. 1998). Findings of fact relevant to the district court's decision are reviewed for clear error. *See Moran v. McDaniel*, 80 F.3d 1261, 1268 (9th Cir. 1996). State court factual determinations are entitled to a presumption of correctness under 28 U.S.C. § 2254(d). *See Villafuerte v. Stewart*, 111 F.3d 616, 626 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 860 (1998); *Collazo v. Estelle*, 940 F.2d 411, 416 (9th Cir. 1991) (en banc).

[1] To prevail on his Fifth Amendment claim, Henry must demonstrate that: (1) his statements were obtained by the police in violation of *Miranda*; (2) the state court committed error in permitting the prosecution to use these improper statements; and (3) the error had a substantial and harmful influence on the jury's determination of its verdict. *See Pope v. Zenon*, 69 F.3d 1018, 1020 (9th Cir. 1996). Post-*Miranda* confessions which are found to be involuntary may not be admitted for any purposes, including impeachment. *See*

[2]Because the petition was filed prior to April 24, 1996, the date of enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), the AEDPA does not apply to this case. *See Lindh v. Murphy*, 521 U.S. 320, 323-24 (1997); *Crandell v. Bunnell*, 144 F.3d 1213, 1315 n.1 (9th Cir. 1998).

United States v. Polanco, 93 F.3d 555, 560 (9th Cir. 1996). Accordingly, we must first determine whether Henry's statements to the police were voluntary.

A. Voluntariness of confession.

[2] It is uncontested that the police officers in this case deliberately violated Henry's *Miranda* rights by continuing with their interrogation after he unequivocally requested an attorney. Despite this violation, both the state trial court and the district court found, and the State continues to argue, that the petitioner's statements were "voluntary and not the result of coercion," and therefore admissible for impeachment.

The voluntariness of a confession is reviewed de novo, *see Collazo*, 940 F.2d at 415, as is the presence of coercive police activity, *see Derrick v. Peterson*, 924 F.2d 813, 818 (9th Cir. 1990). The state court's conclusion regarding whether Henry's confession was voluntary is also reviewed de novo, as it is a legal conclusion, and therefore not entitled to a presumption of correctness. *See Collazo*, 940 F.2d at 415; *Medeiros v. Shimoda*, 889 F.2d 819, 822 (9th Cir. 1989).

Henry contends that the California trial court erred in allowing his post-*Miranda* statements to be used for impeachment purposes, since he was subjected to psychological coercion from the detectives during his interrogation. The State counters that although the detectives did continue illegally to question Henry after he had invoked his right to counsel, the statements he made were voluntary, and thus properly admitted at trial.

[3] Under the Fourteenth Amendment, a confession is involuntary only if the police use coercive means to undermine the suspect's ability to exercise his free will. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *Derrick*, 924 F.2d at 818. Voluntariness depends on such factors as the surrounding circumstances and the combined effect of the entire

course of the officers' conduct upon the defendant. *See Polanco*, 93 F.3d at 560. The test of voluntariness is well established: "Is the confession the product of an essentially free and unconstrained choice by its maker? . . . The line of distinction is that at which governing self-direction is lost *and compulsion, of whatever nature or however infused*, propels or helps to propel the confession." *Collazo*, 940 F.2d at 416 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)) (alteration in the original).

A review of the interview transcript illustrates that Henry's questioning by the detectives was psychologically coercive. Although both the California Court of Appeal and the district court found that the interrogation was conducted calmly in a relaxed setting,[3] this determination is belied by the actual record of the interrogation.

The interview proceeded as follows: After some general initial inquiries, the officers told the defendant that he was under arrest for murder, and advised him of his rights. Henry responded by asking if he could have his lawyer there, then saying he should probably have a lawyer, and finally confirming that he wanted an attorney. Despite these clear and repeated invocations of his *Miranda* rights, however, the officers continued to question Henry. Immediately after Henry's request for an attorney, Detective White asked, "Why did you shoot him anyway?" When Henry responded "Pardon," the officer again asked, "Why did you shoot him?" The officers then proceeded to interrogate Henry for an hour.

[3]The district court found that all of the participants in the interview, including the defendant, spoke in a "quiet, matter of fact tone of voice." This finding, however, does not undermine the conclusion that Henry was confused and frightened. Although the tone of Henry's voice may have been "matter of fact" in the beginning of the interview, the transcript shows that he was sobbing by its end. Further, distress is not invariably reflected in the tone of voice; fear can manifest itself in many ways. The interview transcript reveals a confused and frightened defendant who garbled his sentences, was frequently inaudible, and was often entirely incoherent for long passages.

In response to Detective White's initial two questions as to why he had shot Withrow, Henry answered that he had written multiple checks to Withrow, that Henry couldn't figure out how much money Withrow owed him, that Withrow had "cheated [him] out of money," and that due to his loss of savings, Henry was losing his property. Immediately after these statements, Henry inquired whether he was "supposed to keep talking without an attorney." Detective White interrupted him to state, "Listen, what you tell us we can't use against you right now . . . We'd just would like to know."

[4] At that, petitioner began a long, often incoherent, and confused statement which began, "It started two years after the divorce," and included not only information about Henry's interactions with Withrow but also about Henry's divorce, his property, his automobile accident and head injury, his job, his guns, his children, deer hunting, an old vehicle his brother-in-law was fixing, his experiences in Vietnam, taking his trailer up in the woods, and his frustrated ambition to be a highway patrolman. As evidenced by the transcript, Henry's statements were rambling, disjointed, often unresponsive to the questions asked by the officers, occasionally inaudible, and sometimes virtually incoherent. Throughout his interrogation, petitioner was shaken, confused, and frightened, crying in parts and frequently asking for forgiveness.

[5] We conclude that the slippery and illegal tactics of the detectives overcame Henry's will and that he continued his confession only as a result of their deception. Officer White's statement that "what you say can't be used against you right now" was deliberately designed to undermine Henry's ability to control the time at which the questioning occurred, the subjects discussed, and the duration of the interrogation. Such misleading comments were intended to convey the impression that anything said by the defendant would not be used against him for any purposes. White's further comment that "we just

want to know" reinforced that false impression by suggesting that the officers merely sought to satisfy their curiosity.

In a case with strikingly similar facts, we held that the police's intentional violation of a suspect's *Miranda* rights by continued interrogation rendered any subsequent statements involuntary. *See Cooper v. Dupnik*, 963 F.2d 1220, 1240-41 (9th Cir. 1992) (en banc). In *Cooper*, the Arizona police followed a plan to ignore the suspect's invocation of his constitutional right to remain silent, as well as any request he might make to speak with an attorney, and to interrogate him until he confessed. Although the officers knew any confession thus generated would not be admissible in evidence in the prosecution's case-in-chief, the Arizona police, like the Sacramento sheriffs here, hoped it would be admissible for impeachment if the suspect ever went to trial. *See id.* at 1224.

The *Cooper* defendant, like Henry, "was reduced to a state of agitation and anxiety marked by tears and sobbing . . . He repeated his request for an attorney . . . [t]his request, which contain[ed] a statement of unwillingness to talk, as well as a desire to consult an attorney, was disregarded." *Id.* at 1231. As the *Cooper* Court forcefully stated:

> The conduct of the police in the present case . . . is precisely the type of conduct that concerned the Court in *Miranda* and its immediate predecessor, *Escobedo v. Illinois*. The Court in *Miranda* made clear that it remained concerned about the use of physical brutality in the pursuit of confessions, but it focused primarily on psychological coercion . . . . [The] Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.

Id. at 1241-42 (citations and quotations omitted).

Like the Sacramento sheriffs, the Arizona police refused to honor Cooper's rights when he asserted them, and simply continued questioning him as if no request for counsel had been made. This tactic was designed to generate a feeling of helplessness, and, as we concluded, it was successful:

> [Defendant]'s treatment presents a prima facie case of law-enforcement behavior that violates the Fifth Amendment's privilege against self-incrimination. We stress again that this case does not deal with a product of police interrogation that is just technically involuntary, or presumptively involuntary, as those terms are used in *Miranda* jurisprudence, but with a product that was involuntary *because it was actively compelled and coerced* by law-enforcement officers during in-custody questioning.

Id. at 1243.

[6] As we have previously noted, "*Miranda* expresses concern about the compelling pressures that weigh upon a person in custody, pressures that can break a person's free will and cause that person to talk involuntarily." *Collazo*, 940 F.2d at 417. Detective White took unfair advantages of these pressures. At a point where the law required him to back off, he did not scrupulously honor Henry's right to cut off questioning; instead, he ignored it. Any minimally trained police officer should have known such pressure was improper and likely to produce involuntary statements. *See id.* Because the police tactics and trickery produced a confession which was neither rational nor the product of an essentially free and unconstrained choice, we hold that Henry's post-Mirandized statements were involuntary, and therefore inadmissible for any purpose. The state trial court erred in permitting the prosecution to use these statements for impeachment purposes.

The State contends, as its fallback position, that Henry's post-*Miranda* statements did not lose their voluntariness until

after Henry's inquiry of whether he was "supposed to keep talking without an attorney," was interrupted by Detective White's statement, "Listen, what you tell us we can't use against you right now . . . We'd just would like to know." By that time, Henry had already made a series of admissions. We recognize, of course, that a post-*Miranda* voluntary statement may be used for impeachment purposes. *See, e.g., Harris v. New York*, 401 U.S. 222, 226 (1971); *Cooper*, 963 F.2d at 1250. Even assuming, however, that the State's fallback contention would ordinarily have convincing force, there are two factors in this case which, when combined, distinguish this case from past cases.

[7] The first factor is that the sheriff's officers set out in a deliberate course of action to violate *Miranda*. As the State has acknowledged, "it has been conceded that the detectives knew they were violating *Miranda* when they continued questioning the petitioner after he requested counsel . . . ." (State's Petition for Rehearing and Suggestion for Rehearing En Banc at 2-3.) The State's concession is supported by the record. Thus, like *Cooper*, this case is also distinguishable from *Harris* in that

> *Harris* was a case where no claim [was made] . . . that the police knowingly engaged in calculated misconduct in order to secure the disputed evidence. Moreover, it does not appear that the purpose of the police in *Harris* in securing the disputed evidence was to impinge on the suspect's right to remain silent or his right to testify. In these respects, *Harris* is manifestly distinguishable and thus inapposite to the present case.

Cooper, 963 F.2d at 1249 (brackets in the original) (internal quotation marks omitted) (citing *Harris*, 401 U.S. at 224).

[8] The second factor is that in California out-of-court statements admitted for impeachment are also admitted for the

truth of the matters asserted therein, *i.e.*, also admitted for substantive purposes. *See* Cal. Evid. Code §§1220, 1235. Thus, in California, out-of-court statements admitted for impeachment are, in fact, admitted for the purpose of proving the defendant's guilt. No limiting instruction was given in this case that Henry's post-Miranda statements could be used only to assess Henry's credibility, the classic use of prior inconsistent statements for impeachment, but not to establish the truth of the matters asserted therein. In fact, in this case, the primary evidence which established Henry's motive and rebutted his claim of self-defense was Henry's post-*Miranda* statements. Thus, it is a misnomer to say that Henry's post-*Miranda* statements were admitted for "impeachment." Their primary use was to establish an essential element of the crime charged, as the prosecution argued.

[9] Based on the specific facts of this case, we conclude that the State should not be permitted to use post-*Miranda* statements where the officers set out deliberately to violate a suspect's *Miranda* rights and the evidence obtained in violation of *Miranda* is used to prove the defendant's guilt, even though it is admitted in the guise of impeachment. Thus, for this further reason, we conclude that the state trial court erred in permitting the prosecution to use Henry's post-*Miranda* statements for the truth of the matters asserted therein, as well as for impeachment as a prior inconsistent statement.

B. Harmless error.

We must next decide whether admission of the statements for impeachment purposes was harmless error. *See Arizona v. Fulminante*, 499 U.S. 279, 295 (1991); *Pope*, 69 F.3d at 1025. In the context of habeas review, the standard is whether the error had substantial and injurious effect or influence in determining the jury's verdict. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). We must conduct this analysis "with an awareness that 'a confession is like no other evidence,' and that a full confession may have a 'profound impact' on the

trier of fact." *Pope*, 69 F.3d at 1025 (quoting *Fulminante*, 499 U.S. at 296).

[10] We hold that the introduction of Henry's post-*Miranda* statements for impeachment purposes had a substantial and injurious effect on the jury. The critical evidence used to establish Henry's motive for the shooting was the challenged statements to the police, since the State primarily relied on Henry's confession to prove that his motive for killing Withrow was not fear and self-defense, but his desire for revenge.

At trial, Henry testified that he feared Withrow and his associates because he had seen Withrow with guns at home and in the office, and he had heard that Withrow's associates were Hell's Angels. Henry stated that when he went to meet with Withrow, he took his guns with him for the purposes of protecting himself; he had not planned to kill Withrow. Henry argued that he shot Withrow because he thought Withrow was reaching for a gun in the drawer and was about to shoot him.

After Henry's testimony, the prosecution called Detective Machen, one of Henry's interrogators, as a rebuttal witness. The prosecution introduced the tape-recorded interview of Henry to show that the defendant had not told police officers he killed Withrow in self-defense, nor told the officers that he thought Withrow was reaching for a gun when Henry shot him. In closing arguments, the prosecutor mentioned the interrogation, and argued that during the interview Henry "couldn't give an answer why he took those guns or he didn't want to admit why he took them." Importantly, the prosecutor referred to Henry's motivation for shooting Withrow as "the crux of the case."

[11] The State's use of the challenged statements went to the root of their burden to prove beyond a reasonable doubt that Henry acted with the intent required for a conviction of first or second degree murder, and not in self-defense. This

use of Henry's confession had a substantial effect on the verdict. No other evidence of intent could have impressed the jury in the same way that defendant's own statements did, *see Fulminante*, 499 U.S. at 296, particularly because his confession was played in full for the jury. The error in admitting Henry's statements was substantial and injurious.

Accordingly, because Henry's post-Mirandized statements were involuntary, and the error in admitting Henry's statements had a substantial and injurious effect on the jury's verdict, we grant Henry habeas relief on his Fifth Amendment claim.[4]

III. Constitutional Privacy Claim

Henry also seeks habeas relief on the ground that his constitutional right to privacy was abridged when the state trial court compelled his doctor to testify concerning confidential doctor-patient communications.[5] Henry argues that his communications with Dr. Sander, a medical doctor whom Henry believed to be a psychotherapist, should have been constitutionally privileged. The factual predicate for this claim is undercut, however, by the fact that Dr Sander was not a psychotherapist and the state court's finding that it was not reasonable for Henry to believe that Dr. Sander was a psychotherapist. There can be no psychotherapist-patient priv-

[4]Henry additionally contends that the district court erred in granting the State's motion to strike his declaration of his state of mind at the time of his confession. We need not reach this argument, however, because we grant habeas relief on Henry's Fifth Amendment claim.

[5]In his state court trial, Henry asserted that his communications to Dr. Sander were privileged under Cal. Evid. Code § 1014, which provides that the patient may refuse to disclose and may prevent anyone else from disclosing confidential communications between the patient and his or her psychotherapist. *See* Cal. Evid. Code § 1014(a).

ilege or right to privacy based thereon, constitutional or otherwise, if there is no psychotherapist.[6]

[12] Moreover, there is no constitutional psychotherapist-patient privilege, only a federal evidentiary one. Although the Supreme Court, in *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996), recognized a psychotherapist-patient privilege, it looked exclusively to the Federal Rules of Evidence for authorization. Henry has pointed to no Supreme Court or Ninth Circuit case which recognizes a constitutional privilege for psychotherapist-patient communications, nor any cases which use *Jaffee* to support a constitutional psychotherapist-patient privilege. Therefore, at best, Henry's challenge to the admissibility of Dr. Sander's testimony and notes is a challenge to an evidentiary ruling based on state law.

[13] A federal habeas court, of course, cannot review questions of state evidence law. On federal habeas review, we may consider only whether the petitioner's conviction violated constitutional norms. *See Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991). Even where it appears that evidence was erroneously admitted, a federal court will interfere only if it appears that its admission violated fundamental due process and the right to a fair trial. *See Hill v. United States*, 368 U.S. 424, 428 (1962); *Jeffries v. Blodgett*, 5 F.3d 1180, 1192 (9th Cir. 1993).

[14] Henry has not made a showing that the admission of Dr. Sander's testimony violated due process or his right to a fair trial. At Henry's trial, two witnesses testified that Henry had complained to them about Withrow's handling of his money and property; one of these witnesses further testified that Henry had commented to her that he should do the world a favor and kill Withrow. Thus, Dr. Sander's testimony regarding Henry's confidences did not constitute the only evi-

[6]California has no physician-patient privilege in criminal proceedings. *See* Cal. Evid. Code § 998.

dence that Henry had stated he felt like killing Withrow, or that Henry might have been motivated by revenge. Henry has failed to demonstrate that the admission of Dr. Sander's testimony and notes so fatally infected his trial as to render it fundamentally unfair or that the violation of his privacy resulted in a complete miscarriage of justice. *See Jammal*, 926 F.2d at 919. Accordingly, we affirm the district court's denial of habeas relief to Henry on his constitutional privacy claim.

IV.

Since Henry's post-Mirandized statements were involuntary, and the error in admitting those statements was substantial and injurious, we grant habeas relief on the Fifth Amendment claim, and reverse the district court's denial of the petition for writ of habeas corpus. The case is remanded to the district court with directions to issue a conditional writ of habeas corpus ordering Henry's release, unless the State of California shall retry Henry within a reasonable period of time without using his post-*Miranda* confession.

REVERSED and REMANDED with directions.

APPENDIX D

FILED
NOV. 3, 1999
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BOBBY HENRY,	)	
	)	
Petitioner-Appellant,	)	No. 98-15768
	)	
v.	)	DC No. CV 95-2055-DAD
	)	
PEGGY KERNAN, Warden; DANIEL E. LUNGREN, Attorney General,	)	**O R D E R**
	)	
Respondents-Appellees.	)	

Before: SNEED, TASHIMA, and SILVERMAN, Circuit Judges.

Appellees' motion to stay issuance of mandate is granted. Issuance of the mandate is stayed for 90 days to enable appellees to petition for a writ of certiorari. See Fed. R. App. P. 41(d)(2)(B).

APPENDIX E

INTERVIEW OF BOBBY GENE HENRY

9-6-88 AT 1429 HOURS

WHITE: I got 1429, is that correct?

MALE VOICE: Yes it is.

WHITE: And you're Bobby Gene Henry, right?

HENRY: Yes, right.

WHITE: The address you gave when arrested, that's your current address?

HENRY: Um huh.

WHITE: You live there by yourself?

HENRY: Um huh.

WHITE: Just for your information we had your car towed and ah if you want to we can give it to somebody or else its going to end up costing a lot of money. Is there anybody you want to turn the car over to?

HENRY: You can give it to my ah my ex-wife.

WHITE: What's her name?

HENRY: Nora.

WHITE: You have a phone number or something on her.

HENRY: Ah its 965-3035.

WHITE: Where does she live?

HENRY: In ah Citrus Heights, Mariposa Avenue.

WHITE: Do you know the address?

HENRY: 5656.

WHITE: Ah the keys that were in the car, other than the car keys, those little rings, are they to your house or something?

HENRY: No that was my gate and my mailbox key.

WHITE: Okay, is there a key to your house?

HENRY: No.

WHITE: It's not locked.

HENRY: No you just have to open it up the second window up and reach in and unlock it.

WHITE: Um huh.

MACHEN: (Inaudible) Where were you born?

HENRY: In Oklahoma.

MACHEN: And ah where do you work?

HENRY: Mcclellan Air Force Base.

MACHEN: And what do you do for them out there?

HENRY: Ah I'm called an equipment specialist now.

WHITE: Whereabouts do you work.

HENRY: Building 2 -

WHITE: (Inaudible)

HENRY: Building 269-G.

WHITE: You got a phone number out there.

HENRY: (Clearing throat) Excuse me, yes sir, 643-3582.

WHITE: And your social security number.

HENRY: 547-62-4801.

WHITE: Have you ever been arrested before.

HENRY: No sir.

WHITE: Who do you notify in case there's an emergency, would it be your ex-wife?

HENRY: Yeah.

WHITE: (Inaudible) continue at this point. How long have you been divorced.

HENRY: Two years

MALE VOICE: (Inaudible)

MACHEN: Now according to (inaudible) first of all What's your phone number up in Rescue?

HENRY: 677-5581.

WHITE: Before we go any further we have to advise you of your rights. You're under arrest for murder.

HENRY: yeah.

WHITE: You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to have an attorney present before your questioned. If you can't afford an attorney one will be appointed free of charge before any

questioning. You understand your rights Bobby?

HENRY: I think so.

WHITE: You think so.

HENRY: I don't know, (inaudible) I mean

WHITE: You have any questions about your rights.

HENRY: (Inaudible) can I have my_lawyer here, I don't know

WHITE: That's ah up to you; you're entitled to have an attorney present before you're questioned

HENRY: Right. Probably should have one now.

WHITE: You do want an attorney?

HENRY: Yes, please.

WHITE: Why did you shoot him anyway.

HENRY: Pardon.

WHITE: Why did you shoot him.

HENRY: Cheated me out of money, I was loosing my property.

WHITE: How much money you talking about.

HENRY: I couldn't figure it out, it was so scrambled up, I think it was, I don't know, like, maybe fifty thousand.

WHITE: How - how did he have your money, anyway.

HENRY: I gave it to him.

WHITE: Was it cash you gave to him.

HENRY: I wrote him checks. Am I supposed to keep taking without an attorney. Was I

WHITE: Listen, what you tell us we can't use against you right now.

HENRY: Okay.

WHITE: We'd just would like to know

HENRY: Okay. It started two years ago after the divorce and ah and I got drunk and left and took off in my jeep and had a wreck and ah I ah ended up in the hospital ah at Kaiser ah ah had some kind of head injury, I don't know what it was I ruined my shoulder cause it the socket wouldn't stay in place anymore and ah,

and some other things, and then after I got out of the hospital it was September 14th ah my wife left, had left I mean she was leaving she had a boyfriend and ah (inaudible) and ah I was alone and I that's where it gets screwed I was, I went, I had some properties I used to have rentals and stuff and I worked after work and I bought old houses and fixed them up and (inaudible) nothing fancy just you know just worked on them and ah so I went to try to ah sell one of them and I sold it to Bill. Well I didn't sell it to Bill I went and asked him went back to him ah I wasn't gonna go back with him because it was something before I sold a piece of property and got messed up in escrow but I remember saying I wasn't going to go beck there but then I went back and I had some industrial property (inaudible). I had this I trusted him

I just trusted him and he sold it to somebody, I mean ah sold it to somebody and the guy was supposed to be real good (inaudible) and he wasn't right from the start. Am I found myself begging for my money and then we were going to get into some kind of real estate 60 acres up by Meadow Vista and we was gonna split it 60-40 and ah I had some money and I had good credit and we bought that up there and we you know it was he was gonna turn it in 24 hours cause I had a big income tax bill, cause I sold that property of his.

WHITE: The one on Bell Avenue.

HENRY: Yeah. I had a big tax bill and I didn't have any money left to pay it and we was he assured me don't worry about it we got this we get this other property and turn it in 24 hours and he's got a friend in L.A. I don't

know (inaudible) he's looking to come up here, he's a cement contractor and ah the time came and I wrote checks to him, I don't know why, I wrote $11,000 or more right now and right now I can't believe where I got this money.

WHITE: Why were you writing checks to him.

HENRY: Ah I don't know.

WHITE: Was he asking you for the money.

HENRY: I - I really don't know that either, I for some reason I wrote

WHITE: You got any records of all this?

HENRY: Well in my file cabinet in my trailer. I tried to figure this out a couple year - something like something was telling me something was wrong and I couldn't figure it out. I'd sit down and try to papers nothing was going right paperwork okay. Ah my ex she was on some of the properties and she signed papers

too. Ah but she always threatened to do everything so she was trusted and I was trusting Bill and I - I don't know that ah guy he sold that property to and ah went Bill had claimed that he kinda ah commission on it he said the guy would pay him out of escrow so that he wouldn't have to pay taxes on it or something. And I'm not that way at all, I work for the government I - I (inaudible) my interest for so God damn long and wouldn't do that shit.

WHITE: So this guy's never paid anyone on that deal.

HENRY: Well he paid and he paid and he paid and then Bill owed him some money and then the guy I guess the money that Bill owed him went there and I was signing notes on that property up in Meadow Vista. I just got to the point where I knew he was manipulating me I knew - well I'll tell you what happened

about, ah I was signing for notes we were supposed to get some engineering work done down here at ah there was an engineering place up on Roseville Road and I - I'd go in there and I'd talk to the people and the next day it'd be all mixed up and ah maybe not the exact next day but within the week and it'd be all messed up again and then they wouldn't be doing something right but I thought things were going it was like we had to have some money for engineering to do some road work to develop and stuff. I signed the notes cause the property was in my name. We had an agreement a verbal agreement I guess on the 60-40 so I signed those notes, but I never seen the money just disappeared he was it went in his pocket or I never seen it.

WHITE: Didn't show up (inaudible)

HENRY: Well it kept going so long sometime last year I got I got mad cause I had about $15,000 of my money in there, somewhere around that much, I'm not sure I tried to figure out how much I got in there, tried to make notes and I told him I wanted out of it I couldn't I was living on credit cards and didn't have any money you know to when my wife and I split up and divorced there was enough money, equity in the rentals to to pay her off, her house and stuff that she's in I had to buy that and I would get to keep my property. My property was free and clear and we owed some money on some credit cards cause I was building a house and using credit cards and stuff. Trying to do it myself and ah now I got a note that coming thats come due already on a second extension on it and Bill talked he talked me he talked me into getting that

money borrowing getting some money against it.

WHITE: (Inaudible)

HENRY: On my property.

WHITE: The one in Rescue.

HENRY: Yeah.

WHITE: And with a note

HENRY: Forty five thousand, yeah.

WHITE: And this is you gave him the whole forty five thousand?

HENRY: No, I think that thats where I think the ten I wrote I wrote a check for him ah cause his house was in foreclosure. I loaned him two credit cards. I - I wasn't this kind of person before I was to tight with the dollar, it took me to long and I been taking care of work and just taking care of myself since I was 15 years old. And not smart I just wasn't afraid to work.

WHITE: So

HENRY: So he got its like I had that money and don't worry we're going to sell this other property real fast. I didn't even keep the money to pay my income taxes and I got penalized and they were coming down on me and ah ah there was some ambulance company was after me cause I didn't pay the bill, I never got a bill and then I just went and called them and ah theres a lot happening in the last two years you know I just and ah I just called them and they sent me a bill and I turned it into the insurance they paid it but everything was ah

WHITE: (Inaudible) for a couple of years

HENRY: Yeah, this ah I went to a psychiatrist at Kaiser last year and just before Christmas I think I don't remember dates just can't put them in there and times just don't cause I was really I just laid in bed and I was gonna kill

myself the only thing I laid there for a whole week ah I went through two or three job changes since I I couldn't remember the job when I got back to work that I had so I said well if I can't remember well make a change. I really think you know some of this sounds so God damn phony to me but I remember thinking that but then when I went up to this other place I couldn't handle the job I couldn't remember my old job and then I got this new job and then they reorganized three times and the boss was you know I talked to them I talked to them about the what I did you know and everybody's got problems and ah I think Bill Withrow was laundering the money, I think it was drug money but I don't know. I think he said that to me one time that that guy that bought the property on Bell Avenue from me was he said made a

comment like he's the biggest dealer in northern California. And then

WHITE: What's the address on Bell Avenue.

HENRY: Ah its there was three houses on it its 2026 is one of them I think. There are three houses right together.

WHITE: Sold to one guy?

HENRY: Yeah.

WHITE: But you don't know his name?

HENRY: Yeah, I knew the name.

WHITE: What's the name.

HENRY: Now this is gonna sound phony but should I keep something like this to bargain I don't know, God I just I just did a stupid thing today I went down there to, God damn I went to scare him and I didn't Jesus Christ.

WHITE: Well let me ask you this

HENRY: I yet they're crooks, they're crooks, when I see Bill was telling me my job was so bad

and my ex he had me mad at my wife and he knew all this stuff about me he ah and just kept doing that and I when I finally went to the psychiatrist I realized that it wasn't them it was him and if something was trying to tell me that I was being screwed or didn't you know something was trying to tell me. Ah then he had us the guy's name ah Will Estey.

WHITE: Who?

HENRY: Will or William I guess its Will ah I'll tell

WHITE: What's his last name?

HENRY: Estey, E S T E Y. You'll see some papers I have all my papers up there. I was a little bit afraid of him for my kids I may still be I - now I don't always know where I heard all stuff. I remember I asked Bill afterwards I said what'd you tell me he was a dealer or something. But I - I don't know, I you know I - I don't know where I heard it but

WHITE: Let me ask you this when you were having this problem with your job and going over and to a psychiatrist I want to go over that.

HENRY: I think it was this last year.

WHITE: 1987.

HENRY: Yeah, I think it was Christmas or maybe after the - the dates I don't know.

WHITE: So then the things that really got you concerned as a as of late excuse the note you opened the note on your own property there

HENRY: And I just didn't have any more money, I was, I owed the bank before about twenty thousand dollars on those credit cards and during one of the property's or something we got into I had to pay those credit cards off in order for him - us to get it and he'd he would I know he's forged my name on a document before ah and I went away deer hunting last year and I gave him power of attorney just to

close an escrow. He borrowed money against the property and when it closed I had to get paid off.

WHITE: You ever talk to anybody else about this.

HENRY: I tried, I didn't know where to - I didn't have any more money to go to an attorney I didn't you know, I tried to call - I tried to call the sheriff's department, I tried to call the either the attorney general or district attorney one of them, I'm not sure and they referred me to a - a real estate thing and I ah I just I had all I could handle I just didn't think I could handle any more you know I was trying to keep my job and I worked for 22 years out there well 18 and 4 in the service. I ah

WHITE: So this morning when you were just going over there, to scare him?

HENRY: I called him and told him these promises been dragging on you got to get the money to me

I got to get the money and he ah and I was supposed to call today to find out about it and then well its gonna be maybe next month and he just kept doing that and I took the gun and I don't know why I took the God damn gun down there. God damn!

WHITE: They both your guns?

HENRY: Yeah.

WHITE: And that was your briefcase?

HENRY: I - I have other guns in my house too that you'll find up there I just God damn. Just got back from a week end and went up and set up a deer camp was gonna go deer hunting next week end I guess. (inaudible)

WHITE: When you got over to the office what happened?

HENRY: I told him I didn't, you know, well I called and Bill won't call you back you know the secretary will put you on hold and ah she -

she said she said that about twenty or twenty-five people was calling him yelling and screaming at her to get money out of him. But Bill well I been around him for twelve years you know that something or other happened I said I wouldn't go back with him and I used to go to his house and his kids call me Uncle Bob and Jesus Christ.

WHITE: Well it sounds to me like you lost control of it for a while. Ah ah (inaudible) from what you've told us so far your intentions wern't [sic] to go over there wasn't to shot

HENRY: (Inaudible) I don't I killed one last year the first time I ever got to go out of state.

WHITE: So what'd you - what was your conversation like with him.

HENRY: I told him the bills are due I got to make a payment on that house that Nora's in and I didn't have any money. I didn't have any

money to date with except credit I got credit cards back up to eighteen thousand or some bullshit like that. They were paid off once but I just none of the money came back from him that he owed me and the promises and ah (inaudible) kids and his kids and

WHITE: So what you're telling me (inaudible)

HENRY: He said well I'm working on a deal and it may close and may get the money next month but I heard that over and there was one deal that closed and I was supposed to get twenty-five thousand dollars in money out of it and it was when I sold that my what interest I had I didn't get any profit on that place in Meadow Vista. We bought it for a hundred thousand dollars and he turns his commission into it he does that on properties and it never shows up like a profit so he doesn't pay taxes on it. So I had we were

supposed to split 60-40 and he was supposed to come up with 60 percent of the down payment with his commission and whatever and I went I'd been I had to go TDY back to Dayton, Ohio and I just called him one day to see how things were going and he said oh great I'm glad you called he needed extra money that he didn't have. I had to call the banker to get the money over to he didn't have his part and it kept dragging it was supposed to turn and sell cause I was living on my credit cards again and ah when ah I the guy Bill owed that guy I had the that guy refinanced Bell Avenue and Bill was supposed to pay the note fee or loan fee well I got stuck with it. Bill was supposed to pay for it it was four thousand or something and that guy had some money coming from somebody on an escrow up in Swansborough country

and when he got it I was supposed to get a check for the money that I had in that property and then there's a ninety-eight hundred dollar C.D. that I had to put down as security on that property up there. He was ah he was making payments on it ah I I've been threatened you know by the bankers and stuff because I took the credit cards back away from him because he maxed them out and then contacted those people and tried to get an extension on the credit and stuff and I was it was my credit cards that loaned to him and I couldn't get him to stop and I couldn't get the credit card people to help me. They said because I let him use them all the time.

WHITE: How long ago was that.

HENRY: That's still going on. I'm still getting I changed credit card numbers on two of them I gave him two credit cards. That was

supposed to be to keep track of our deal on the Meadow Vista property but ended up with Christmas shopping and everything else on it it was supposed to been so we could keep track of meals and any kind of work we did that transpired on that property up there in Meadow Vista.

WHITE: What banks or credit cards are those.

HENRY: One is ah one is, one is ah Western Savings and Loan and the other one is ah something bank card ah if you looked in my file cabinet up there there's I put BW by Bill's ah credit cards and I'd go over to collect the money for the payment on the credit cards and the checks would bounce and I'd have to send them back through or go out and cash them at his bank. And ah

WHITE: You have quite a file up there.

HENRY: Yeah well yeah but I can't figure out I was doing so (inaudible) I used to think I was pretty good I always did all my own papers and stuff except my taxes I had people do them. But I always knew where things were at I knew which one where the money was and everything but last year I couldn't keep track and the last couple years I couldn't keep track of anything I just find things in the wrong folders and I tried to sort them out and I'd sit down and spend the whole weekend and but not really get anything done cause I just couldn't focus on what the heck was going on.

WHITE: And was it like that before your divorce or after your divorce.

HENRY: It was after.

WHITE: (Inaudible)

HENRY: (Inaudible) Ah never had any problems before ah

WHITE: Did your wife kind of take care of all that stuff (inaudible)

HENRY: I did it all.

WHITE: (Inaudible)

HENRY: Just my kids

WHITE: How old are the kids.

HENRY: One is seven, one is ah fifteen.

WHITE: (Inaudible)

HENRY: Huh.

WHITE: Getting back to the weapons. What transpired today (inaudible) when Bill ah standing up or sitting down when this all started?

HENRY: I think we were sitting down at his desk and I was talking to him about not having any money and I needed some money and why he hadn't paid on something in two years and ah

and ah I don't know my ah I don't know I don't know if I got notes against what I got cause I don't really know what all I signed. He used to have ah there's a young girl there that used to work for him that was a notary public and she just leaves her book there and comes back later and signes [sic] it whatever and you know doesn't really witness the things in it. He put in there note one note that he borrowed against some property he put down that he had ah power of attorney and he didn't but I signed it in the notary book because I kept thinking he was gonna pay me and I just it was just I just I just

WHITE: You sat in one chair and put your briefcase in another chair?

HENRY: I sat down. Just sit it there

WHITE: In other words he was sitting behind his desk?

HENRY: Huh.

WHITE: He was sitting behind the desk.

HENRY: Yeah.

WHITE: Did you fire both guns?

HENRY: I'm sure I did. I - I don't - I don't remember why I took two guns. (Inaudible)

WHITE: They were both working.

HENRY: Yeah. I keep them I used to keep them in the little dresser cabinet drawer there under my clothes at night but I really did go over there, afraid of what, I didn't know I you know if this Will Estey was good or bad or whatever but there was another secretary that used to work there when she quit working there he seemed to have a scam that he gets people that are in a depressed state or something and then kinda takes advantage of them and she was going through a divorce. She was a secretary and I started talking to her away

from there, and ah she was afraid of Will Estey too.

WHITE: What was her name.

HENRY: Her name's Kathy Morrall. I hate to do this I know she's still going through a lot of problems and

WHITE: Kathy who?

HENRY: Morrall. I hate to do this I know she's still got a lot of problems and

WHITE: You know a phone number you got on her

HENRY: It's ah probably in my, my trailer's a mess. It's probably up there she's she lives out in ah

WHITE: Where?

HENRY: Off Hazel as you go from Madison toward the river. She was afraid for her son ah she was ah I think Bill mentioned one time that he could hire 15 people to ah keep somebody in there (inaudible) I can't remember how he said it.

WHITE: He seems to be a pretty well liked for the Honorary Mayor of Fair Oaks and has a lot of plaques and stuff up there. He obviously (inaudible) huh?

HENRY: Well I think that if you talk to that Kathy she - you'll find out that he's getting to a lot of people in Fair Oaks. I think even the Sacramento Bee would put an ad in the paper for him without money first. I don't know, I just, I'm - I don't know if I imagined all this stuff or just

WHITE: Well didn't some (inaudible) was it the Union? Somebody did a big story on him. Wasn't it a while back.

HENRY: And that was another thing

WHITE: Well what was that story about?

HENRY: I didn't read it somebody tried to show that to me out at work and and I they said hey, they knew Bill was a friend and they said here's a

story about your friend and I said ah I just I'd already decided I wasn't gonna deal with him so I didn't read it I just I never read it, I never and ah the time he told me he that he got sued but he won cause the woman was just ah had done the same scan before or something he won this lawsuit or something I don't know. I didn't you know if he was everything was okay why couldn't he get credit and why did we let him use our credit cards. And I paid more I didn't have - they wern't [sic] paid off completely but I kept making extra payments on them cause the people kept the credit card companies kept calling and saying you're way over the limit five hundred dollars or something like that send the money or we're gonna do something whatever they were gonna do and I'd panic and send the money and I was paying more

money than what I had owed on it. I was paying, I was payomg [sic] his bills and I don't know, God

WHITE: The way this was handled after this happened and you left and went over to (inaudible)

HENRY: Yeah, I just, I was running I didn't know I didn't know where I don't know. I - I never have run or hid from anybody before I was heading - I think I was gonna go go home but I didn't know, you know, up in Rescue I don't know. I - I stopped I mean Jesus Christ I sorta

WHITE: Any reason why you went to Baseline.

HENRY: Just, I don't know (inaudible) I don't know, scared I don't know, i don't know. i ah you know just went ah ah we were fixing my jeep back up and had the brother in law come by last year and said he'd fix it up and then it was last year or the year before. And I

would of, and I said he could fix it up cause I had a (inaudible) I just put on not too long ago. It was an old jeep and I just (inaudible) and ah I paid him for his labor and parts cause he was out of work and needed some money and I let him have the jeep and I signed the pink slip over to him cause I was afraid he would drive it without insurance on it and I'd get sued. Then he took it to Stockton and started it out then left my sister, I know I hurt a lot of people and ah I'm just, you know, ah.

WHITE: I know.

HENRY: There's guys we left over in Viet Nam and who said they had it so rough once (inaudible)

WHITE: Okay, well we're like you and wished it never happened but

HENRY: Well I'm sorry guys

WHITE: Unfortunately it happened and you know I'm we can kinda understand how things happened before

HENRY: Oh God (crying) EverythIng seemed okay yesterday, I was just okay. (Inaudible) we went and took the trailer and my car the trailer up in the woods and (inaudible) I just love being out there. My boss was not boss this is the second or third boss I've had in the past two years and two or three days after he got on the job he was talking about down grading me and and cause I was incompetent or something. I tried (inaudible) didn't know how to pray. (Inaudible) I was just feeling sorry for myself and (inaudible) And my older daughter hasn't come up in a couple years she's been gone for two years now. (Inaudible) I don't know, maybe I'm not a nice person I

WHITE: Yeah. Who knows what happens when you get under all this strain and pressure you know.

HENRY: Yeah, but (crying - inaudible)

WHITE: We're not saying its right though Bobby

HENRY: (Crying) I know

WHITE: But

HENRY: I wanted to be with you guys I took that exam eleven years ago and I had I thought I'd better keep my job until I pass it. I had to take a physical and somebody I always wanted to be I wanted to be a highway patroleman [sic] before I went into the service.

WHITE: You want to call your ex-wife and tell her what happened.

HENRY: (Crying) No

WHITE: Cause it's gonna be on the news, it's gonna be in the papers.

HENRY: (Crying) Yeah, I better tell her my babies I don't know what to do she

(END OF TRANSCRIPTION)

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No. 99-1078

In the

Supreme Court of the United States

October Term, 1999

PEGGY KERNAN, WARDEN,
Petitioner,

v.

BOBBY HENRY,
Respondent.

On Petition for Writ of Certiorari
For the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ORIGINAL

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QUESTIONS PRESENTED

Petitioner seeks certiorari on questions that are not presented in this case. This Court should deny certiorari because the Court of Appeals for the Ninth Circuit held that, under the facts of this case, the defendant's statements to police were involuntary and erroneously introduced at defendant's trial.

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I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

In 1988, Mr. Henry was arrested for shooting Bill Withrow, a friend and business associate. After shooting Mr. Withrow, Mr. Henry drove a short distance from the scene, then called 911, reported what he had done and asked to have the police sent to pick him up. During this call, Mr. Henry was weeping and berating himself, and did not attempt to disguise what he had done. When the police arrived, he surrendered and was taken to the Sacramento County Sheriff's Office. A short time thereafter, he was interviewed by Detectives White and Machen in an interrogation room. The Court of Appeals' opinion records what transpired during that interview succinctly and accurately. Petitioners' Exhibit C, Henry v. Kernan, No. 98-15768, slip op. at 12928-35 (9th Cir., May 26, 1999, amended October 25, 1999). The crucial points are: (1) the detectives recited the standard *Miranda*[1] warnings, and then, when Mr. Henry twice unequivocally asserted his right to counsel, deliberately and wilfully ignored his requests and continued to interrogate him without respite; (2) Mr. Henry was distraught and virtually incoherent during most of the interview; (3) Mr. Henry had never been arrested previously, and had no experience of police interrogation tactics; and, (4) during the interrogation, Mr. Henry did not specifically state that he shot Mr. Withrow because he believed Mr. Withrow was about to shoot him.

Mr. Henry was charged with the first degree murder of Mr. Withrow, and was tried twice. The first trial ended in a mistrial with the jury deadlocked at 11 to one for acquittal. At the second trial, the defense moved to suppress Mr. Henry's statements. At a hearing on the motion, one of the detectives, a twenty-year veteran with nine years' homicide experience, admitted that

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1. *Miranda v. Arizona*, 384 U.S. 436 (1965).

he and his colleague had deliberately continued to question Mr. Henry despite his invocations of his right to counsel, in the hope of obtaining impeachment evidence.

The trial court admitted Mr. Henry's statements on the ground that, although the detectives "intentionally went beyond the law," the circumstances were not such as to induce a false confession and therefore the statement was admissible as "impeachment" if Mr. Henry chose to testify. Mr. Henry testified, and his entire tape-recorded statement was admitted not only for impeachment but, in accordance with California evidentiary law, for the truth of the matters asserted therein. Petitioner's Exhibit C, Henry v. Kernan, slip op. at 12932-33. Thus, as the Court of Appeals noted, "[T]he primary evidence which established Henry's motive and rebutted his claim of self-defense was Henry's post-*Miranda* statement." Id., slip op. at 12933. Indeed, the prosecution used Mr. Henry's statement to argue during closing argument that Mr. Henry's statement showed that Mr. Henry was not motivated by fear but by the desire for revenge, an issue which the prosecution characterized as "the crux of the case." Id., slip op. at 12934. Mr. Henry was convicted of second-degree murder with a firearm use enhancement and sentenced to a term of seventeen years' to life imprisonment.

Mr. Henry's conviction was affirmed by the state appeals court, and review by the California Supreme Court was summarily denied. In 1995, Mr. Henry applied for habeas corpus relief in the United States District Court for the Eastern District of California. In 1997, the Magistrate Judge issued Findings and Recommendations recommending that relief be granted on the ground that the actions of the interrogating detectives violated Mr. Henry's constitutional privilege against compelled self-incrimination.

The district judge declined to accept the Magistrate Judge's recommendation and denied

relief. Mr. Henry then appealed the decision to the Court of Appeals for the Ninth Circuit.

In a unanimous opinion, the Court of Appeals for the Ninth Circuit reversed the district court and remanded. It directed the district court to issue a conditional writ of habeas corpus ordering Mr. Henry's release unless the State should retry him within a reasonable period of time without using his post-*Miranda* confession. The decision was published. Petitioners petitioned for rehearing and suggested rehearing *en banc*. On October 25, 1999, the appellate court amended its earlier decision and, with the amendment, denied rehearing and declined rehearing *en banc*. Petitioners obtained a stay of the mandate, and filed the instant petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit. Because this case is not appropriate for review by this Court, respondent Henry opposes the petition.

II. REASONS FOR DENYING THE WRIT

A. THE COURT OF APPEALS HOLDING CONFORMS TO THE ESTABLISHED PRECEDENTS OF THIS COURT

The petition for certiorari is based upon a faulty premise. Petitioners insist that the Court of Appeals ruled that *voluntary* statements taken in violation of *Miranda* are excludable for any purpose. To the contrary, the Court of Appeals held that Mr. Henry's statements were *involuntary*. Ptrs. Exh. C, Henry v. Kernan, Case No. 98-15768, slip op. at 12927-29 (9th Cir., October 25, 1999). As this Court has repeatedly held, involuntary statements, whether obtained in violation of *Miranda* or not, are never admissible at trial for any purpose, including impeachment.

Petitioners urge this Court to grant certiorari on the ground that the Court of Appeals for the Ninth Circuit "announced a new exclusionary rule with respect to statements taken in

violation of *Miranda*." Petition at 6. Petitioners are wrong. This is not a *Miranda* case, but a case implicating the underlying Fifth Amendment guarantee against compelled self-incrimination. The Court of Appeals' holding conforms with and relies upon this Court's precedents, and thus does not implicate this Court's holding in *Teague v. Lane*.[2/]

Petitioners have conceded throughout this litigation that the interrogating detectives knew they were violating *Miranda* when they continued questioning Mr. Henry after he requested counsel *both times*. Petitioners have also argued that, even assuming that the detectives' false promise made subsequent statements involuntary, statements made between the first and second requests for counsel were voluntary. Petitioners now seek certiorari on the factual question whether Mr. Henry's statements after he first requested counsel but prior to his second request were voluntary. The Court of Appeals rejected this argument by finding that *all* of Mr. Henry's statements were involuntary. This factual determination was properly and correctly made by the Court of Appeals and is thus not grounds for a writ of certiorari. *See* Rule 10, Supreme Court Rules.

The Court of Appeals found all of Mr. Henry's statements to be involuntary on two grounds: first, that the detectives used psychological coercion to overcome Mr. Henry's will; and, second, that the deliberate and calculated purpose of the detectives' conduct, unlike that of the officers in *Harris*, was designed from the very beginning of the interrogation to break Mr. Henry's will and secure self-incriminating statements that could be used against him at trial under the guise of impeachment, but which would really be used as substantive evidence of his guilt. This Court has repeatedly held that the voluntariness of a confession is determined by

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2. 489 U.S. 288, 310 (1989).

examining the totality of the circumstances. *See Withrow v. Williams*, *supra*, 507 U.S. at 689 (collecting cases). It has long been established that the "circumstances" include the officers' conduct as well as its effect upon the suspect. *See, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). Where law enforcement officers deliberately violate *Miranda* in order to break a suspect's will, and succeed, then the statements obtained thereby are involuntary and inadmissible for any purpose.

Mr. Henry's statements were coerced by his interrogators' refusal to honor his requests for counsel. Petitioners attempt to distinguish, as they have done all along, between those statements that preceded and succeeded the detectives' false promise that any statements that Mr. Henry made could not be used against him. What petitioners ignore, but what the Court of Appeals recognized, is that from the first time Mr. Henry unequivocally invoked his right to counsel only to have it ignored and the interrogation continue without respite, the inherently coercive conditions of custodial interrogation combined with the officers' deliberate misconduct and Mr. Henry's own vulnerabilities to overcome his will.[3/] The detective's subsequent inducement, after Mr. Henry's second unequivocal request for counsel, merely increased the already crushing weight of coercion. Ptrs. Exh. C, slip op. at 12931 ("Because the police tactics *and* trickery produced a confession that was neither rational nor the product of an essentially free

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3. Mr. Henry filed a sworn declaration which the Magistrate Judge expanded the record to include, pursuant to Rule 7 of the Rules Governing Section 2254 Cases. In this declaration, Mr. Henry described the physical actions of the interrogating officers, which are not of course apparent from the audiotape, and their effect on his state of mind. He also described how his training as an Air Force officer engaged in covert operations in Southeast Asia during the Vietnam War interacted with his perceptions of his interrogators, including their physical actions. He said that he had been trained for the eventuality that he might be captured by the enemy and that, if he was, he should not attempt to withhold information from them, but should attempt to appease them.

and unconstrained choice, *we hold that* Henry's post-Mirandized statements were involuntary, and therefore inadmissible for any purpose.")(emphasis added).

Thus, the Court of Appeals' holding does not, as petitioners assert, create a "new exclusionary rule" based on officers' deliberate misconduct for voluntary statements that otherwise would be admissible for impeachment. To the contrary, the appellate court's holding is squarely within this Court's precedents prohibiting the use of involuntary statements for *any* purpose.

B. THE COURT OF APPEALS DID NOT IMPOSE A NEW RULE REQUIRING STATE COURTS TO GIVE A LIMITING INSTRUCTION WHEN VOLUNTARY CONFESSIONS ARE ADMITTED FOR IMPEACHMENT; THEREFORE, THERE IS NO ISSUE FOR THIS COURT TO REVIEW, AND CERTIORARI SHOULD BE DENIED

The Court of Appeals held that all of Mr. Henry's statements were involuntary and inadmissible for all purposes. The court rejected petitioners' alternative argument, that part of Mr. Henry's statements were admissible under the impeachment exception to *Miranda*'s general exclusionary rule.

The Court of Appeals correctly distinguished between this Court's cases creating the impeachment exception in cases where law enforcement officers merely violated the *Miranda* rules and the conduct in this case, in which the officers' deliberate and wilful misconduct attacked the core protections of the Fifth Amendment. As the appellate opinion correctly notes, in *Harris v. New York*, 401 U.S. 222 (1971), this Court carved out an exception to the general rule excluding statements taking in violation of *Miranda*. But in *Harris*, and in *Michigan v. Tucker*, 417 U.S. 433 (1974), the interrogating officers did not have the benefit of this Court's guidance in *Miranda*, and therefore any violations were inadvertent. More importantly, the

violations in those cases did not implicate the core protections of the Fifth Amendment because there was no suggestion that the officers' deliberate misconduct produced compelled statements. Ptrs. Exh. C, slip op. at 12932, *quoting Cooper v. Dupnick*, 963 F.2d 1220, 1249 (9th Cir. 1992)(en banc), *cert. denied*, 506 U.S. 953 (1992); *see also*, *Guiffre v. Bissell*, 31 F.3d 1241, 1256 (3d Cir. 1994)(distinguishing case at bar from *Cooper* on grounds no evidence of deliberate violation of substantive rights). Here, as the appellate court noted, the officers' tactic was *designed* to generate a feeling of hopelessness. Ptrs. Exh. C, slip op. at 12931. Because the officers' deliberate misconduct was designed to and did generate a feeling a hopelessness, the Court of Appeals found that all of Mr. Henry's statements following his first request for counsel were involuntary and thus outside the *Harris* impeachment exception.

The Court of Appeals correctly distinguished this Court's cases creating the impeachment exception to the general exclusionary rule of *Miranda*. In *Harris v. New York*, *supra*, this Court expressly noted, "Petitioner makes no claim that the statements made to the police were coerced or involuntary." 401 U.S. at 224. Moreover, as previously discussed, the interrogation in *Harris* preceded this Court's *Miranda* decision, and, therefore, the police officers did not have the benefit of *Miranda*'s discussion of the kind of admonitions that would serve to secure the privilege against compelled self-incrimination. Thus, *ipso facto*, the officers did not deliberately violate the defendant's rights.

Likewise, in *Michigan v. Tucker*, *supra*, there was no claim that the defendant's statements were extracted by coercion; the interrogation predated *Miranda*; and there was, therefore, no deliberate police misconduct. 417 U.S. at 444-46. Indeed, in *Tucker*, this Court distinguished situations in which the *Miranda* rules alone were violated from those in which both

Miranda and the underlying Fifth Amendment rights were violated. *See Tucker*, 417 U.S. at 445-46. The *Tucker* Court found that the purpose of *Miranda* rules alone, to deter police misconduct during interrogation, are sufficiently served by prohibiting the introduction of evidence obtained in violation of *Miranda* from being used during the prosecution's case in chief. *Id.* at 447. Where, however, there is deliberate police misconduct designed to overcome the suspect's will and obtain involuntary statements, it is not *Miranda* alone which is violated. Indeed, exclusion of involuntary confessions was assured prior to *Miranda*, and does not depend upon it. *Id.* at 456. (BRENNAN, J., concurring). One of the justices who disapproved of *Miranda* still opined that even confessions by third-party witnesses, if involuntary, should be excluded. *Id.* at 461 (WHITE, J., concurring).

In *Oregon v. Hass*, 420 U.S. 714 (1975), the third case generally considered to have defined the impeachment exception and the only one of the three in which the interrogation itself actually postdated *Miranda*, this Court still found it dispositive of the issue that the defendant's statements had not been coerced. In *Hass*, the defendant, accused of bicycle theft, was given his full *Miranda* warnings and, on the way to the police station, requested counsel but was told that he would have to wait until they arrived at the stationhouse. The statement he made after requesting counsel but before arriving at the stationhouse was ruled inadmissible during the prosecution's case in chief. The defendant then took the stand and obviously perjured himself. On rebuttal, the previously-excluded statement was admitted. This Court held that the statement was properly admitted under the *Harris* exception to *Miranda*'s exclusionary rule. Important to this holding was the Court's finding that, "There is no evidence or suggestion that Hass' statements to Officer Osterholme on the way to [the police station] were involuntary or coerced."

420 U.S. at 722-23. Again, it was only *Miranda* and not the Fifth Amendment itself which was implicated.

Interestingly, in *Hass*, this Court recognized the potential danger that "when proper *Miranda* warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material," but dismissed it as a "speculative possibility." *Hass*, *supra*, 420 U.S. at 723. In the instant case, that is precisely what occurred.[4/] As this Court said in *Hass*, "If, in a given case, the officer's conduct amounts to an abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness." 420 U.S. at 723. This is such a case, and the Court of Appeals properly decided it applying "traditional standards for evaluating voluntariness." Petitioners cannot prevail, therefore, on their claim that review should be granted because the Court of Appeals' decision does not conform to those of this Court.

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4. Police officers throughout the state of California and in Arizona have, in fact, been trained to continue questioning "outside *Miranda*" for the express purpose of obtaining impeachment evidence. This training takes as its starting point the impeachment exceptions this Court created in *Harris* and its progeny. The detectives who interrogated Mr. Henry had received such training. The abuses to which the deliberate policy of violating *Miranda* have lead are demonstrated not only in the instant case but in *Cooper v. Dupnick*, 963 F.2d 1220 (9th Cir. 1992)(en banc) and *California Attorneys for Criminal Justice v. Butts*, ___ F.3d. __, No. 97-56510 (9th Cir., November 9, 1999, as amended upon denial of rehearing and rehearing en banc, January 3, 2000), both actions arising under 42 U.S.C. § 1983. Thus, it would appear, the deterrent effect upon law enforcement abuses *Miranda* was designed to exert has largely been lost since *Harris*, and will only be regained because of the cost of defending, and losing, these actions.

In *dicta*, the Court of Appeals cited a second factor in determining that the statements in this case did not fall within the impeachment exception. That is, under California's evidentiary rules, Mr. Henry's statements were perforce introduced as substantive evidence of his guilt.

Petitioners are correct in saying that the hearsay rule discussed by the Court of Appeals was upheld against a *Confrontation Clause* challenge by this Court in *California v. Green*, 399 U.S. 149 (1970). The issue in *Green*, however, has nothing to do with the issues presented here.

In *California v. Green*, a prosecution witness testified at trial that he did not recall certain events, whereupon the prosecutor "refreshed" his witness's recollection by reading to him from his inconsistent preliminary hearing testimony. In addition, the police officer to whom the witness had made certain statements concerning the crime (a minor marijuana offense) testified concerning the statements. Both the preliminary hearing testimony read into the record and the officer's testimony were presented as substantive evidence of the defendant's guilt under Section 1235 of the California Evidence Code, the same section cited by the Court of Appeals in the *dicta* portion of its opinion.

The issue in *Green*, as defined by this Court, was whether the Confrontation Clause of the Sixth Amendment was offended by a State's statutory rule permitting the introduction of prior inconsistent statements by a witness *other than* the defendant as substantive evidence of the defendant's guilt. *California v. Green*, 399 U.S. at 155-56. This Court found that it was not, as long as the declarant was testifying as a witness subject to full and effective cross-examination. *Id.*, 399 U.S. at 158. The Court's holding was based on its examination of the historical evils the Confrontation Clause was designed to avert: the use of depositions and ex parte affidavits in lieu of in-court testimony. The Court found that, while the hearsay rule against admitting out-of-

court statements helped to protect the Constitutional right to confrontation, as long as the witness was subject to cross-examination and could authenticate or deny his prior statements under oath the purposes of the Confrontation Clause were served.

Here, the evil that the *Miranda* safeguards are designed to avert is very different; the use of a *defendant's* compelled self-incriminating statements against him at trial. While the historical purposes of the Confrontation Clause are served if a testifying witness is subject to cross examination under oath and in the presence of the jury, the historical purposes of the Fifth Amendment's prohibition against compelled self-incrimination are not. "The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago." *Michigan v. Tucker*, 417 U.S. 433, 440 (1974). As this Court has previously held, a confession that is obtained through compulsion must not be used at trial "even if it is true, because of the 'strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.'" *Jackson v. Denno*, 378 U.S. 368, 385 (1964), *quoting Blackburn v. Alabama*, 361 U.S. 199, 206-07 (1960); *see also*, *Withrow v. Williams*, 507 U.S. 680, 691-92 (1993)(reciting the values the Fifth Amendment protects), *quoting Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55 (1964).

Whereas, therefore, this Court found that the California hearsay rule did not violate the Confrontation Clause because it still permitted the jury to fully assess the credibility of a witness, it does not follow that the Fifth Amendment is satisfied when the same rule is used to admit a defendant's compelled confession as substantive evidence of his guilt. Admission of a

defendant's compelled self-incriminating statements is of an altogether different order than the admission of prior inconsistent statements of any other witness. This Court in *Jackson* recognized the danger that a jury may not be able to comprehend the policy reasons forbidding their reliance on a coerced by true confession and may not be able, therefore, to sort out the circumstances under which the confession was obtained from the fact of the confession itself. *Jackson v. Denno, supra*, 378 U.S. at 382.

For the reasons stated above, petitioners' citation to *California v. Green* is inapposite. Moreover, their entire argument is based upon a distortion of the Court of Appeals' opinion. Petitioners completely mischaracterize the Court of Appeals' mention in *dictum* of California's hearsay rule as a "holding" that state trial courts "are obligated to instruct sua sponte that statements admitted for impeachment under *Harris v. New York* may only be considered for that purpose and may not be considered for the truth of the matter." First, the Court of Appeals' decision is expressly limited to the specific facts of the instant case, and does not announce a general rule at all. Ptrs. Exh. C., slip op. at 12933.

The Court of Appeals in its harmless error analysis determined that admission of Mr. Henry's involuntary statements "went to the root of their burden to prove beyond a reasonable doubt that Henry acted with the intent required for a conviction of first or second degree murder and not in self defense." Ptrs. Exh. C, slip op. at 12934. "No other evidence of intent could have impressed the jury in the same way that defendant's own statements did. . .." *Id.*, *citing Arizona v. Fulminante* 499 U.S. 279, 296 (1991). While it is true that Mr. Henry's trial counsel declined a limiting instruction, it is also true that no limiting instruction could have averted the harm done by admitting the involuntary statements in the first place. *See Arizona v. Fulminante*, 499 U.S. at

313 (KENNEDY, J., concurring)(distinguishing the "indelible impact" of a confession from the "impact of an isolated statement that incriminates the defendant only when connected with other evidence": "If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case.").

In sum, the Court of Appeals properly considered the specific facts of this case and based its holding on those facts. Petitioners' argument that certiorari should be granted because the opinion announced a general rule is based on a complete misreading of the opinion, and is not grounds for granting review.

III. CONCLUSION

The Court of Appeals for the Ninth circuit correctly upheld precedent holding that a defendant's involuntary confession is inadmissible for any purpose. The Petition for Writ of Certiorari should be denied.

Dated: January 25, 2000

QUIN DENVIR
Federal Defender

BY _____
CONNIE MARIE ALVAREZ*
Assistant Federal Defender
Attorney for Respondent
Bobby Gene Henry

*Counsel of Record

No.99-1078

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

PEGGY KERNAN, WARDEN

Petitioner,
-vs.-
BOBBY HENRY,

Respondent.

CERTIFICATE OF SERVICE

I, Connie M. Alvarez, being first duly sworn, depose and say:

On January 25, 2000, the RESPONDENT'S BRIEF IN OPPOSITION AND MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS was served on all parties required to be served in compliance with Supreme Court Rule 29.3, by depositing the documents, first-class postage prepaid, in a United States mailbox on January 25, 2000, addressed to counsel as follows:

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Solicitor General of the United States
950 Pennsylvania Ave., N.W. Room 5614
Washington, DC 20530-0001

Executed at Sacramento, California, January 25, 2000.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

CONNIE M. ALVAREZ
Assistant Federal Defender

Supreme Court, U. S.
FILED
DEC 30 1999
CLERK

No. 99-1078

In The

Supreme Court of the United States

PEGGY KERNAN, WARDEN,

Petitioner,

vs.

BOB HENRY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* COUNTY OF ORANGE, STATE OF CALIFORNIA SUPPORTING GRANT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*

The County of Orange, State of California, has more than 65,000 criminal prosecutions each year. Many of these cases involve issues of confession admissibility under this Court's various exclusionary rules. Misapplication of these exclusionary rules by the Ninth Circuit Court of Appeals on *habeas* review may cause unwarranted suppression of probative evidence, unnecessary retrial and, in some cases, acquittal of guilty perpetrators. Orange County has an interest in seeking correction of Circuit rulings that are at odds with this Court's precedents.

SUMMARY OF ARGUMENT

(1) Ruling on a *habeas corpus* petition from a state court murder conviction, the Ninth Circuit erroneously purported to grant relief on *Fifth* Amendment grounds, when the admissibility of the killer's confession for impeachment was solely an issue of *Fourteenth* Amendment due process. (2) The Ninth Circuit used the wrong test of voluntariness in deciding admissibility. (3) The inducement used by the interrogating officer was not so coercive as to undermine reliability of the confession or fairness of the jury's verdict. (4) Interrogation after a *Miranda* invocation neither violates the Fifth Amendment nor *ipso facto* renders a statement involuntary. (5) Once the killer testified, introduction of his prior inconsistent statement did not deprive him of a fair trial.

ARGUMENT

(1) Based on the facts that (a) a police officer asked Henry questions after his request for counsel and (b) the officer told Henry his answers could not be used against him "right now," the Ninth Circuit concluded Henry's murder confession was involuntary as a matter of law. So, said the Ninth Circuit, "We grant habeas relief on the Fifth Amendment claim."

Like Henry, the Ninth Circuit has its constitutional amendments confused. The introduction of an involuntary confession in a state court trial is not a *Fifth* Amendment error at all. Instead, the improper admission in evidence of an involuntary confession "violates the Due Process Clause of the *Fourteenth* Amendment." *Payne v. Arkansas*, 356 U.S. 560, 568 (1958) (emphasis added).

> [T]actics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the *Fourteenth* Amendment's guarantee of fundamental fairness. Indeed, even after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogations, . . . the Court has continued to measure confessions against the requirements of due process.

Miller v. Fenton, 474 U.S. 104, 110 (1985) (emphasis added) (citations omitted). *Accord Colorado v. Connelly*, 479 U.S. 157, 163 (1986).

Unfortunately, the Ninth Circuit's confusion of *Fourteenth* Amendment voluntariness law with *Fifth* Amendment self-incrimination law is chronic, infecting cases

involving both criminal admissibility issues and civil liability issues. *Compare Collazo v. Estelle*, 940 F.2d 411 (9th Cir. 1991) (mixing Fifth and Fourteenth Amendment concepts in a *habeas* case), with *CACJ v. Butts*, 195 F.3d 1039 (9th Cir. 1999) (permitting state police officers to be sued under 42 U.S.C. § 1983 on a Fifth Amendment claim, based on allegations that interrogation rendered statements inadmissible under the Fourteenth Amendment). The present case affords the Court an opportunity to clarify the critical distinctions between self-incrimination and due process, and between *Miranda* violations and Fifth Amendment violations.

(2) In making its voluntariness calculation, the Ninth Circuit resorted to the "free will" analysis this Court specifically and unmistakably repudiated in *Connelly*, 479 U.S. at 169-170. The voluntariness standard embraced by the Ninth Circuit looks for compulsion "of whatever nature or however infused." But this Court said in *Connelly*, 479 U.S. at 168, that the voluntariness inquiry should focus on "the presence of police coercion." The Ninth Circuit's substitution of a "free will" examination in place of this Court's "official coercion" standard will cause voluntariness determinations to go awry, as in the present case. This mistake should be corrected before great damage ensues.

(3) The case at bench is not one where police mistreated a prisoner in order to extract a coerced confession. After informing Henry that "anything you say can and will be used against you in a court of law" (Page 4, Appendix E, Petition of the State of California for writ of certiorari), the officer merely told Henry after *Miranda* invocation, "What you tell us, we can't use against you

right now." At worst, this statement was misleading. But taken together with the warning that anything Henry said "can and will" be used in court, this assurance was hardly so coercive as to render his subsequent statement involuntary *as a matter of law*, so as to justify an appellate court in overturning the contrary findings of the trial court, which heard witnesses on the issue. The officer's statement hardly rises to the level of the inquisitorial techniques against which due process protects.

(4) But the Ninth Circuit also – and primarily – based its finding of involuntariness on the fact that the interrogating officer intentionally continued questioning after Henry's request for counsel. While this fact certainly would be relevant to the admissibility of statements in the prosecution's case in chief under *Miranda*, "since [Henry's] statements were not used as part of the prosecution's case in chief but only in impeachment, any violation of *Miranda* [ ] was irrelevant." *Mincey v. Arizona*, 437 U.S. 385, 410, fn. 2 (1978) (Rehnquist, J., concurring and dissenting).

This Court has plainly said, "A *Miranda* violation does not *constitute* coercion. . . . " *Oregon v. Elstad*, 470 U.S. 298, 306, fn. 1 (1985). And, "a *Miranda* violation 'does not mean that the statements received have actually been coerced, . . . '." *Arizona v. Fulminante*, 499 U.S. 279, 293, fn. 7 (1991) (plurality). In direct conflict with this understanding, the Ninth Circuit has declared in this case that "[T]he police's intentional violation of a suspect's *Miranda* rights by continued interrogation rendered any subsequent statements involuntary." (Citing *Cooper v. Dupnik*, 963 F.2d 1220, 1240-1241 (9th Cir. 1992) – another circuit opinion that improperly mixes Fifth and Fourteenth

Amendment concepts). Because the Ninth Circuit's equation of *Miranda* noncompliance with actual coercion violates this Court's precedent and amounts to Circuit nullification of this Court's rulings on admissibility for impeachment, this decision should be reversed.

(5) Although Henry's statement was introduced to impeach his inconsistent trial testimony, the Ninth Circuit found reversible error because no limiting instruction was given, and the prosecutor used the evidence in argument. Aside from the fact that Henry declined the trial judge's offered limiting instruction (for whatever tactical reason he may have had), the absence of such jury instruction is poor reason to overturn a criminal conviction. "A defendant's confession is . . . so damaging that a jury should not be expected to ignore it, *even if told to do so. . . .* " *Fulminante*, 499 U.S. at 292 (plurality) (emphasis added). "Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind, *even if told to do so.*" *Bruton v. United States*, 391 U.S. 123, 140 (1968) (White, J., dissenting) (emphasis added). This being the recognized reality, a limiting instruction in this case would have served no practical purpose in altering the outcome of the jury's deliberations; therefore, we confront a case in which a court of justice has ordered a murderer's release for no better reason than *pro forma* insistence on the performance of a meaningless ritual.

COPY

No. 99-1078

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IN THE SUPREME COURT OF THE UNITED STATES

PEGGY KERNAN, *Petitioner*,

v.

BOBBY HENRY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

No. 99-1078

PEGGY KERNAN, *Petitioner*,

v.

BOBBY HENRY, *Respondent*.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to paragraph 6 of Rule 14 of the Rules of the Supreme Court of the United States, petitioner hereby replies to the Opposition to Petition for Writ of Certiorari in order to correct a misrepresentation of the record which is contained in that Opposition.

In footnote 3 at page 5 of the Opposition, respondent refers to a "sworn declaration [by Mr. Henry, the respondent] which the Magistrate Judge expanded the record to include." Respondent represents that in this declaration, he described the physical actions of the interrogating officers which are not evident on the tape recording or transcript, and their effect upon his state of mind. He also claims that the declaration includes a description of his military experience and that his training included the importance of appeasing his captors rather than withholding information in the event he was captured by the enemy.

It is correct that, over petitioner's objection, the Magistrate Judge initially ordered this declaration to be included in the record. However, in an order filed November 7, 1996, United States District Judge David F. Levi granted petitioner's motion for reconsideration and ordered the declaration stricken. In relevant part, Judge Levy said:

> Absent compliance with the standards of 28 U.S.C. § 2254 (e) (2), petitioner may not decline to offer testimony at a state court suppression hearing, and then seek to offer that testimony in a habeas corpus proceeding by way of a declaration that is not even subject to cross examination. Although the magistrate judge may later determine that the declaration or testimony should be received under applicable standards for the receipt of new evidence, absent a showing of cause and prejudice or compliance with § 2254 (e) (2), the declaration may not be received under Rule 7.

The magistrate judge never subsequently allowed either the declaration or testimony. Therefore, contrary to the representation in footnote 3 in the Opposition to Petition for Writ of Certiorari, the declaration was not properly before the District Court and was not part of the record considered by the United States Court of Appeal for the Ninth Circuit.

Respondent contends that the Ninth Circuit's decision is nothing more than an application of the well known rule that involuntary statements taken in violation of Miranda are inadmissible for any purpose. It is true that the Ninth Circuit held that petitioner's statements were involuntary. However, a careful reading of the

decision shows clearly that the court found petitioner's *first statement involuntary solely* because officers knowingly violated Miranda when they continued their questioning after respondent requested counsel. That is the new rule which violates *Teague v. Lane*, 489 U.S. 288 (1989) and which, in effect, overrides *Harris v. New York*, 401 U.S. 222 (1971) and it progeny.

Petitioner disagrees with respondent's reading of the Ninth Circuit's decision as holding that

> from the first time Mr. Henry unequivocally invoked his right to counsel only to have it ignored and the interrogation continue, the inherently coercive conditions of custodian interrogation combined with the officers' deliberate misconduct and Mr. Henry's own vulnerabilities to overcome his will.

Opposition at p. 3. This Court will decide whether that is a fair reading of the decision or a proper application of the standards for determining voluntariness. However, petitioner strongly objects to counsel's reference to Mr. Henry's declaration as if it supports a finding that Mr. Henry was particularly vulnerable to the inherent stress of

police interrogation. The reference to a declaration that was ordered stricken from the record is nothing less than an attempt by counsel to mislead the court.

Dated: January 31, 2000.

Respectfully submitted,

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